1995

F. C. Stangl, III v. Ernst Home Center : Brief of Appellee

Utah Court of Appeals

Roger J. Kindley, John P. Mele, Anne Swensen. Attorneys for Appellant.
Stephen G. Crockett, Stephen T. Hard, Naci Snow Bockelie, Rebecca S. Parr. Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

F.C. STANGL, III, Plaintiff/Appellee, vs. ERNST HOME CENTER, INC., Defendant/Appellant.	Court of Appeals No. 950187-CA District Court No. 890902771 (Priority No. 15)

BRIEF OF THE APPELLEE

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HONORABLE MICHAEL MURPHY

Roger J. Kindley (WSBA 11875)
John P. Mele (WSBA 16381)
RYAN, SWANSON & CLEVELAND
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034
Telephone: (206) 464-4224

Anne Swensen (A4252)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

Attorneys for Appellant

Stephen G. Crockett (#0766)
Stephen T. Hard (#1359)
Nanci Snow Bockelie (#6702)
Rebecca S. Parr (#6628)
GIAUQUE, CROCKETT, BENDINGER & PETERSON
First Interstate Plaza
170 South Main, #400
Salt Lake City, Utah 84101
Telephone: (801) 533-8383

Attorneys for Appellee

IN THE UTAH COURT OF APPEALS

F.C. STANGL, III, Plaintiff/Appellee, vs. ERNST HOME CENTER, INC., Defendant/Appellant.	Court of Appeals No. 950187-CA District Court No. 890902771 (Priority No. 15)

BRIEF OF THE APPELLEE

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HONORABLE MICHAEL MURPHY

Roger J. Kindley (WSBA 11875)
John P. Mele (WSBA 16381)
RYAN, SWANSON & CLEVELAND
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034
Telephone: (206) 464-4224

Anne Swensen (A4252)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

Attorneys for Appellant

Stephen G. Crockett (#0766)
Stephen T. Hard (#1359)
Nanci Snow Bockelie (#6702)
Rebecca S. Parr (#6628)
GIAUQUE, CROCKETT, BENDINGER & PETERSON
First Interstate Plaza
170 South Main, #400
Salt Lake City, Utah 84101
Telephone: (801) 533-8383

Attorneys for Appellee

TABLE OF CONTENTS

Page

JURISDICTION 1

STATEMENT OF ISSUES AND STANDARDS OF REVIEW 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

SUMMARY OF ARGUMENT 21

ARGUMENT 22

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT PROMISSORY ESTOPPEL IS AN AVAILABLE REMEDY IN THIS CASE 22

II. BECAUSE ERNST FAILED TO MARSHALL THE FACTS, IT CANNOT NOW ARGUE THAT THE TRIAL COURT ERRED IN ITS FINDINGS OF FACT 30

III. THE EVIDENCE BEFORE THE TRIAL COURT CLEARLY SUPPORTS THE COURT'S APPLICATION OF PROMISSORY ESTOPPEL 32

A. Ernst was aware of all facts material to the agreement 33

B. The trial court correctly found that Ernst promised to lease the Plaza site and that such promise fit within the doctrine of promissory estoppel 35

C. Stangl purchased the Plaza in reasonable reliance upon Ernst's promise 37

D. Stangl suffered detriment as a result of his reliance on Ernst's promise and the trial court employed the proper measure of damages to ensure justice 40

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING CERTAIN EVIDENCE OBJECTED TO BY ERNST 46

CONCLUSION 50

TABLE OF AUTHORITIES

CASES

Alaska Airlines v. Stephenson,
217 F.2d 295 (9th Cir. 1954) 27

Allen v. Prudential Property & Casualty Insurance Co.,
839 P.2d 798 (Utah 1992) 22

Andreason v. Aetna Casualty & Surety Co.,
848 P.2d 171 (Utah App. 1993) . . 2, 24, 25, 29, 40, 41, 42

Babey v. Lowman,
218 N.E.2d 626 (Ohio 1966) 27

Bennett Leasing Co. v. Ellison,
387 P.2d 246 (Utah 1963) 26

Bill Nay & Sons Excavating v. Neeley Construction Co.,
677 P.2d 1120 (Utah 1984) 22

Breaux v. Schlumberger Offshore Services,
817 F.2d 1226 (5th Cir. 1987) 41

Budge v. Barron,
169 P. 745 (Utah 1917) 26

Carnesecca v. Carnesecca,
572 P.2d 708 (Utah 1977) 26

Chedd-Angier Production v. Omni Publications Int.,
756 F.2d 930 (1st Cir. 1985) 41

Chidester v. Eastern Gas and Fuel Associate,
859 P.2d 222 (Colo. App. 1992) 26

Commercial Union Associates v. Clayton
863 P.2d 29 (Utah App. 1993) 31

Crail v. Blakely,
505 P.2d 1027 (Calif. 1973) 27

Crismon v. Western Co.,
742 P.2d 1219 (Utah App. 1987) 2

Darrington v. Wade,
812 P.2d 452 (Utah App. 1991) 46

Easton v. Wycoff,
295 P.2d 332 (Utah 1956) 23, 24, 25

English v. Standard Optical Co.,
814 P.2d 613 (Utah App. 1991) 28

Farmland Service Cooperative, Inc. v. Klein,
244 N.W.2d 86 (Neb. 1976) 28

Fisher v. Fisher,
907 P.2d 1172 (Utah App. 1995) 26

Gerson Electric Construction v. Honeywell, Inc.,
453 N.E.2d 726 (Ill. App. 1983) 41

Goldstick v. ICM Realty,
788 F.2d 456 (7th Cir. 1986) 41

Greaves v. Medical Imaging Systems, Inc.,
879 P.2d 276 (Wash. 1994) 27

Interiors Contracting v. Smith Halander,
881 P.2d 929 (Utah App. 1994) 30, 31

Jacobson v. Cox,
202 P.2d 714 (Utah 1949) 26

John Price Associates, Inc. v. Warner Electric, Inc.,
723 F.2d 755 (10th Cir. 1983) 36

Kiely v. St. Germain,
670 P.2d 764 (Colo. 1983) 26

Klinger v. Kightly,
889 P.2d 1372 (Utah App. 1995) 2, 40

Lake Philzas Service v. Valley Bank,
845 P.2d 951 (Utah App. 1993) 32

Ludlow v. Colorado Animal By-Products Co.,
137 P.2d 347 (Utah 1943) 41

Mahoney v. Delaware McDonald's Corp.,
770 F.2d 123 (8th Cir. 1985) 42, 43, 44

McIntosh v. Murphy,
469 P.2d 177 (Hawaii 1970) 26, 27, 29

McKinnon v. Corporation of the President of the Church of Jesus Christ of Latter Day Saints,,
529 P.2d 434 (Utah 1974) 23, 24, 25, 29

Medesco v. LNS International,
762 F. Supp. 920 (D. Utah 1991) 23, 24, 25, 26, 29

Mountain States Broadcasting Co. v. Neale,
783 P.2d 551 (Utah App. 1989) 31

Nicol v. Nelson,
776 P.2d 1144 (Colo. App. 1989), cert.
denied, 785 P.2d 917 (Colo. 1989) 26

Ohline Corp. v. Granite Mill,
849 P.2d 602 (Utah App. 1993) 1, 31

Pasker, Gould, Ames & Weaver, Inc. v. Morse,
887 P.2d 872 (Utah App. 1994) 21

Phillips v. Hatfield,
904 P.2d 1108 (Utah App. 1995) 32

Ravarino v. Price,
260 P.2d 570 (Utah 1953) 23, 24, 25

R.J. Daum Construction Co. v. Child,
247 P.2d 817 (Utah 1952) 36

Sanders v. Arkansas Missouri Power Company,
593 S.W.2d 56 (Ark App. 1980) 33

Saunders v. Sharp,
806 P.2d 198 (Utah 1991) 1

Schwedes v. Romain,
587 P.2d 388 (Mont. 1978) 28

Signal Hill Aviation Co., Inc. v. Stroppe,
158 Cal. Rptr. 178 (1979) 41

Soter's Inc. v. Deseret Federal Savings & Loan
Ass'n,
857 P.2d 935 (Utah 1993) 2

Southeastern Equipment Co. v. Mauss,
696 P.2d 1187 (Utah 1985) 24, 25, 29

State v. Pena,
869 P.2d 932 (Utah 1994) 1

Stearns v. Emery-Waterhouse Co.,
596 A.2d 72 (Maine 1991) 27

Teece v. Teece,
715 P.2d 106 (Utah 1986) 46

Tolboe Const. Co. v. Staker Paving & Const Co.,
682 P.2d P.2d 843, 845 (Utah 1984) 40

Trad Industries Ltd. v. Brogan,
805 P.2d 54 (Mont. 1991) 28

Trolley Square Associates v. Nielson,
886 P.2d 61 (Utah App. 1994) 1, 2

Trollope v. Koerner,
515 P.2d 340 (Ariz. App. 1973) 42

Turnbaugh v. Anderson,
793 P.2d 939 (Utah App. 1990) 31

Union Tank Car Co. v. What Bros.,
387 P.2d 1000 (Utah 1964) 33

Walker v. Ireton,
559 P.2d 340 (Kansas 1977) 27

Walters v. Marathon Oil Co.,
642 F.2d 1098 (7th Cir. 1981) 41, 42

Warder & Lee Elevator, Inc. v. Britten,
274 N.W.2d 339 (Iowa 1979) 26

West Valley City v. Majestic Investment Co.,
818 P.2d 1311 (Utah App. 1991) 31

Westside Galvanizing Services, Inc. v.
Georgia-Pacific Corp.,
921 F.2d 735 (8th Cir. 1990) 41

Wilk v. Vencill,
180 P.2d 351 (Cal. 1947) 41

STATUTES

Utah Code Ann. § 78-2a-3(2)(k) (1992) 1

OTHER AUTHORITIES

Calamari & Perillo, The Law of Contracts §
19-48, 841-44 & n. 68 27

Corbin on Contracts § 1.13 (Rev'd Ed. 1933) 35

Corbin on Contracts § 8.11 (Rev'd Ed. 1993) 25, 41

Corbin on Contracts § 8.12 (Rev'd Ed. 1993) 33, 42

Restatement (Second) of Contracts § 90 . . . . . 24, 25, 33, 41

Restatement (Second) of Contracts, § 139 . . 23, 27, 28, 33, 41

Plaintiff/appellee F.C. STANGL, III ("Stangl"), respectfully submits this brief in response to the Brief of defendant/appellant ERNST HOME CENTER, INC. ("Ernst").

JURISDICTION

On March 8, 1995, the Utah Supreme Court transferred this matter to the Utah Court of Appeals, which has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(k) (1992).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Although Ernst has adequately enumerated the issues on appeal, it ignores its burden of marshalling the evidence and mischaracterizes the law applicable to its second, third and fifth issues. Because much of Ernst's appeal amounts to no more than a challenge of the trial court's findings of fact, Ernst has a duty to marshal the evidence in favor of the facts as found by the trial court. Ohline Corp. v. Granite Mill, 849 P.2d 602, 604 (Ut. App. 1993). Because Ernst failed to do so, this appellate court must assume "that the record supports the findings of the trial court" and proceed only to review the accuracy of the lower court's conclusions of law and the application of that law to the case." Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991).

Ernst attempts to mask this shortcoming by characterizing the issues on appeal as predominately legal. Contrary to Ernst's assertion, however, the application of the facts to the legal standard of promissory estoppel inherent in Ernst's second issue presents a mixed question of fact and law, the determination of which is "highly fact-dependent." Therefore, it is reviewed for clear error. Trolley Square Assocs. v. Nielson, 886 P.2d 61, 65 (Utah App. 1994); State v. Pena, 869 P.2d 932, 938 (Utah 1994);

Soter's Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935 (Utah 1993); Crismon v. Western Co., 742 P.2d 1219, 1223 (Utah App. 1987).

Similarly, whether the trial court adopted the proper measure of damages for promissory estoppel, Ernst's third issue, requires application of a clearly erroneous standard, because damage assessment is a function of the fact finder. Andreason v. Aetna Cas. & Sur. Co., 848 P.2d 171, 174 (Utah App. 1993). Even if viewed as a mixed question of law and fact, this Court must affirm unless it finds clear error. Trolley Square, *supra*, Soter's, *supra*, Klinger v. Kightly, 889 P.2d 1372, 1381 (Utah App. 1995).

Finally, the trial court's damages calculation challenged by Ernst's fifth issue is presumed correct and will only be overturned "if it is clearly erroneous with no reasonable support in the evidence." Klinger v. Kightly, 889 P.2d 1372, 1381 (Utah App. 1995).

STATEMENT OF THE CASE

Stangl initiated this action on or about May 2, 1989, by filing his Complaint asserting claims against Ernst for breach of a contract, promissory estoppel and breach of the implied covenant of good faith and fair dealing. (R. 1-11.)[1] Stangl alleged that Ernst breached its agreement to enter into a 25-year lease for the anchor space at the Jordan Valley Plaza, or alternatively that he was entitled to recover damages under promissory estoppel because he purchased and renovated the Jordan Valley Plaza in reasonable

---

[1] Throughout this brief materials in the record on appeal are cited as "R. ____." Similarly, references to the Appellant's Brief are cited as "Ap. Brf. At ____."

and detrimental reliance on Ernst's promise to become the anchor tenant. (R. 1-11.)

The bench trial before the Honorable Michael Murphy commenced on February 11, 1993. (R. 2214, 3069.) The liability phase ran from February 11 to February 19, 1993. (R. 2214, 3069.) On February 17, 1993, the court bifurcated the trial into "liability" and "damages" phases, partly to allow the parties time to sort out the damages claim. (R. 2000, 7289-365.) On April 20, 1993, the trial court entered a Memorandum Decision in which it held that Ernst and Stangl had not entered into either a written or oral contract. (R. 2000-14.) (Attached as Addendum A). The court, however, left open the question of whether Stangl could recover damages under the theory of promissory estoppel. (R. 2000-14.)

The damages phase of the trial commenced one year later on February 22, 1994 and ran through February 24, 1994. (R. 2214.) Following that phase, the court ruled that Stangl had established promissory estoppel. (Conclusions of Law ("Conclusions") Nos. 1-12, R. 2229-32). Based upon substantial evidence of oral representations and, more importantly, Ernst's conduct and actions, the court found that Stangl reasonably, substantially, and detrimentally relied on Ernst's promise to enter into a lease as anchor tenant of the Plaza property. Thus, Stangl was entitled to recover his out-of-pocket expenses incurred in the acquisition and renovation of the Plaza property in the amount of $331,391.00. (Conclusions Nos. 1-12, R. 2229-32, Ex. 88A.)

On December 27, 1994, the trial court entered its Findings of Fact and Conclusions of Law and a Judgment in favor of Stangl. (R. 2213-37.) (Attached as Addenda B and C). The court determined

that promissory estoppel could be invoked to bar the statute of frauds in this case. (R. 2012.) Ernst filed its appeal on January 20, 1995 challenging the availability of promissory estoppel as a remedy in this case and challenging the court's findings of fact in support of its conclusions. (R. 2243-44.)

STATEMENT OF FACTS

Although Ernst challenges the trial court's factual findings in this appeal, it has completely failed to marshal the facts adduced at trial which support the court's findings. Instead, in its statement of facts and in the body of its brief, Ernst has done nothing more than reiterate its version of the facts -- a version already rejected by the trial court. To fully inform the court of the true and complete facts of the case, Stangl sets forth here the trial court's relevant findings of fact, with supporting record citations to supporting testimony and documentary evidence.

1. The property that is the origination of this dispute is an "anchor space" store located in the Jordan Valley Plaza (the "Plaza") on the southwest corner of 9000 South and Redwood Road in West Jordan, Utah. (Finding of Fact No. 3 ("Finding"), R. 2215; see also 2916.) As of 1988, the time of the negotiations that are the subject of this action, the anchor store space had been vacant over a year, and the entire Plaza was deteriorated and in need of refurbishment. (R. 2916, 3503.)

2. Stangl had owned the Plaza from 1979 to 1981. (Finding No. 4, R. 2215, see also 2916-23.) Stangl transferred the majority of the property to Roger Brockbank et ux. ("Brockbank") in 1981, retaining two out parcels or "pads." He remained a guarantor of Brockbank's loan for the purchase. The lender's interest in

Brockbank's loan was subsequently assigned to Aetna. (Finding No. 4, R. 2215, see also 2920.)

3. In early 1987, Brockbank's anchor tenant, Gibson Discount Store, vacated the premises, as well as other sites across the western United States. Ernst investigated the possibility of putting a store in sites Gibson had vacated, including the Plaza site. (R. 3495-96.) Ernst also commissioned a Site Feasibility Study for West Jordan, which it received in May 1987. (Finding No. 7, R. 2216, 3496, Ex. 1.) Despite the marginal sales projected by the site feasibility study, Ernst remained interested in the Plaza site, and sometime in 1987 contacted Stangl to indicate its interest in the Plaza. (R. 2927.) Ernst then investigated the property through Brockbank, who owned the Plaza at that time, but was informed that he had leased the site. (See R. 3496-97.)

4. In or about September 1987, Aetna formally notified Stangl that Brockbank had defaulted on the purchase loan. (R. 2923, 3938-40, Ex. 393.) Aetna, however, never demanded payment from Stangl as a guarantor of the Brockbank obligation. (R. 2924, 3420, 3926.) Both Aetna and Stangl believed that the value of the Plaza would exceed the value of the amounts due on the loan, and thus Stangl would not be liable to Aetna for any deficiency.[2] (Finding No. 6, R. 2215-16; see also 2923-26, 3419-20, 3930.) Aetna initiated a nonjudicial foreclosure on the Plaza and Brockbank filed for Chapter 11 bankruptcy. (Finding No. 6, R.

---

2 Aetna's attorney, Steven Tyler, testified at trial that Aetna proceeded with the nonjudicial foreclosure because it did not believe that a deficiency was likely. (R. 3930.)

2215-16.) Thus, Stangl had no incentive to acquire the Plaza property to avoid liability as a guarantor of the Aetna loan.

5. Seeing a business opportunity with respect to the Plaza following Brockbank's bankruptcy, Stangl arranged for Steve Pruitt ("Pruitt"), as his agent, to inquire whether Ernst remained interested in leasing the former Gibson space at the Plaza. (Finding No. 8, R. 2216; see also 2927.) In or about late May 1988, Pruitt contacted Mack DuBose, ("DuBose") Ernst's Vice President of Real Estate, to explore Ernst's interest in the Plaza location. (R. 4140.) DuBose indicated that Ernst was interested in the property as a site for an Ernst store. (Finding No. 9, R. 2216.)

6. On June 3, 1988, Pruitt forwarded documents relating to the Plaza property to DuBose. (Ex. 2.) In his June 3 letter, Pruitt erroneously indicated that Aetna would be enforcing Stangl's guarantee, that Stangl would have possession of the property by the end of June, and suggested that Stangl would refinance the Plaza property with Aetna.[3] (Finding No. 10, R. 2216-17; see also 2928-29, 4125-26, Ex. 2.)

7. Between June 4 and June 23, 1988, DuBose, Thomas Stanton and Rod King, all of Ernst, met with Pruitt and visited the Plaza property to inspect the site of the proposed West Jordan Ernst store. (Finding No. 11, R. 2217; see also 2930, 3501, 4126-27,

---

3 Ernst argues that Pruitt's June 3 letter negates any claim that Stangl relied on Ernst's representations in purchasing the property. That argument, rejected by the court, is negated by the evidence showing that Ernst knew that Pruitt's representations were in error and that Stangl had to acquire the property and obtain financing before he could begin construction requested by Ernst. See paragraphs 27 and 28 below.

4039.) The day following the inspection meeting, Pruitt and DuBose met to discuss a possible lease and lease terms. (R. 3503.) At that meeting, DuBose indicated that Ernst desired to move forward with construction and negotiations for Ernst to lease the anchor property at the Plaza on a "fast-track" basis to ensure delivery of the premises to Ernst on October 1, 1988.[4] (Finding No. 11, R. 2217; see also 3503-05, 3585.)

8. Beginning sometime in June, the parties both treated the project as an expedited one. Ernst was aware that Stangl needed approximately sixty days prior to October 1, 1988 to complete the required construction (Finding No. 31, R. 2224; see also 3584) which would include, among other things, asphalt work, plumbing work, installing utilities and underground lines for drainage, surface concrete and curbs, earthwork, dredging, installing a new roof, building an addition, moving and installing sewage systems, relocating fire hydrants and signs, and renovating the building to fit Ernst's needs. (R. 3018-26, 3036-38, 3001; Exs. 25, 73-73E, 76, 71-71E.)

9. On June 23, 1988, Pruitt, acting on behalf of Stangl, proposed basic terms and conditions for a lease agreement between Ernst and Stangl for the anchor property located at the Plaza, including (a) the store location; (b) the building size; (c) the primary lease term; and (d) base rent. These essential lease terms did not change throughout the course of the parties' subsequent

---

[4] A "fast-track" required the parties to undertake development activities (plans and specifications, construction, improvements, financing, etc.) concurrently with lease negotiations, to ensure that the property would be ready for occupancy within a very short time frame.

communications. (Exs. 3, 6, 9A, 12, 13, 23, 26, 27, 31.) In his letter, Pruitt specifically referenced Ernst's request that Stangl be able to provide a turn-key building to Ernst on a fast-track basis to be ready for fixture installment by October 1, 1988. (Ex. 3.)

10. In responding to Pruitt's June 23, 1988 letter, DuBose indicated that the parties' next step was to complete a "binding Offer to Lease" and that drafting the final lease would take 3-5 weeks. (Ex. 6.) Significantly, DuBose specifically agreed that Stangl should provide Ernst a turn-key building with an October 1, 1988 fixturing date, just over two months away. (R. 3584; Ex. 6.) Thus, if the parties were to wait for a formal signed lease, there likely would not have been sufficient time to meet the October 1 fixturing date.[5]

11. Although he testified at trial that he believed there were no legal consequences which would flow from Ernst's "binding Offer to Lease," and that items in such a document would ultimately be contained in the final lease agreement, DuBose never communicated to Pruitt or Stangl any perceived limitations on the "binding Offer to Lease." (R. 2219-220, 3509-10, 3520-21, 3598, 4128.)

12. On June 29, 1988, in anticipation of Ernst's fast-track tenancy, Stangl obtained the rights, but not the obligation, to acquire the Plaza property by entering into negotiations with both Brockbank and Aetna, the lien holder. (Finding No. 14, R. 2217; see also 3877-78.) On that date, Stangl paid Brockbank $1,000 and

---

[5] Time to complete the "binding offer to lease," plus 21-35 days for time to complete architectural drawings and obtain financing and all necessary permits, would not have left Stangl 60 days to complete construction prior to October 1, 1988.

entered into an option to purchase the Plaza property from Brockbank, conditioned on conveyance of a warranty deed, Bankruptcy Court release of the property and Brockbank's ability to deliver clear and satisfactory title ("Purchase Option").[6] (Finding No. 14, R. 2217-18; see also 2942-45, 3877 Ex. 5 (attached as Addendum D.) The Option's exercise price was $1,500. (Finding No. 14, R. 2217-18; see also 2942-45, Ex. 5.) Stangl also made an offer to purchase Aetna's note ("the trust deed") on the Plaza which Aetna rejected, (Ex. 310 (attached as Addendum E) Ex. 314). On July 1, 1988, Stangl again offered to purchase the trust deed from Aetna for $900,000, but conditioned his agreement on receipt of satisfactory title, and, if necessary, Bankruptcy Court approval and Aetna's acceptance within ten days ("Offer to Purchase"). (Finding No. 14, R. 2947-49; see also 3877-78, 3879-86, Ex. 315 (attached as Addendum F).) Aetna accepted Stangl's offer on or about July 14, 1988 and granted Stangl the conditional right to purchase the Brockbank trust deed. (Ex. 317 (attached as Addendum G).)

13. Stangl's interest in the Plaza property hinged on Ernst's leasing the anchor space. (Finding No. 16, R. 2218, 2975-76, 3029, 3421-23, 3877-78, 4354-59.) Stangl had no other need to purchase the property. (Finding No. 16, R. 2218.) Had Stangl wanted to acquire the property for speculative purposes, he would have waited to acquire the Plaza property at the trust deed foreclosure sale. Instead, Stangl acquired the option to purchase the Plaza property from Brockbank and conditionally offered to purchase the trust deed

---

[6] As of June 29, 1988, the property was encumbered by liens amounting to approximately $72,201.15 (See Ex. 66A (attached as Addendum I).)

from Aetna to facilitate the speedy acquisition of the Plaza property, solely to meet Ernst's fast-track fixturing date of October 1, 1988. (Finding No. 16, R. 2218-19; see also 3877-78.)

14. On July 12, 1988, Stangl received a letter dated July 8, 1988, from DuBose which was the formal binding "Offer to Lease" referred to in his June 29 correspondence. (Finding No. 20, R. 2220, Ex. 9A.) The July 8, 1988 letter reiterated the terms of Stangl's June 23rd letter and added additional detail to those terms. In this communication, Ernst represented that it expected that the parties would cooperate and diligently pursue the preparation and execution of the lease documents and other obligations. (Ex. 9A, 12.)

15. On or about July 12, 1988, Stangl and DuBose had a telephone conversation during which they discussed the terms set forth in DuBose's July 8 letter, that Stangl's lenders would need to approve the type of insurance coverage Ernst required and that Stangl would need to know the specific improvements required by Ernst in order to obtain appropriate loan amounts. (R. 2220, 2957-63, 2964-74, 4130.) After that conversation, Stangl believed that they had reached an agreement as to all the essential terms of the lease. (R. 2983-85.)

16. On July 15, 1988, DuBose wrote to Hal Smith, Ernst's president, for approval to enter into an "Offer to Lease" with Stangl for the Plaza property and attached, among other things, the 1987 Robertson feasibility report. DuBose indicated in that memorandum that construction "must begin by 8/15/88." (R. 3541-44, 3626-28, Ex. 14.)

17. Believing that all essential lease terms had been agreed upon, and anticipating no problems with Ernst becoming the anchor tenant, on or about July 16, 1988, Stangl then took steps towards obtaining financing from Valley Mortgage Corporation ("Valley Bank") for the acquisition of the Plaza property, construction of improvements requested by Ernst, and renovation of other portions of the Plaza property. (Ex. 15.) Stangl sought approximately $1.1 million to acquire the Plaza property: $655,000 to remodel the anchor site for Ernst; and $131,000 to remodel other shop space at the Plaza property. (R. 3459, Ex. 15.) Stangl agreed to provide additional security to Valley Bank by using the two adjacent out-parcels, both of which were leased, as cross-collateral for the Plaza property loan. (Finding No. 23, R. 2221, Exs. 15, 79A.) Valley Bank would not have approved the financing absent Ernst's tenancy. (R. 3421-23, 3483.)

18. On July 18, 1988, DuBose sent to Pruitt Ernst's financial statement via overnight mail. (R. 3009-10, Ex. 18.) Pruitt told DuBose that Stangl needed the financials to aid in procuring financing for the project. (R. 4131-32, 3009-10.) Thus, Ernst knew that Stangl would be incurring significant financial obligations with the project.

19. On or about July 19, 1988, after receiving Ernst's financial statements, Valley Bank approved Stangl's loan request. (Finding No. 23, R. 2221.) The loan agreement closed on July 28, 1988. The agreement provided that no funds would be disbursed until Stangl actually acquired title to the Plaza property. (Finding No. 24, R. 2222; see also 4341, Ex. 311.)

20. In a letter dated July 18, 1988, the Dykeman Architects, which Ernst had hired to design the Plaza property store, indicated that they had "begun work on this project." (Ex. 17.) From July through September, Dykeman Architects performed $19,581.60 in services and expenses for Ernst. (Ex. 88A.) Most of that work was completed in July. (Ex. 34.)[7]

21. On July 28, 1988, Stangl exercised his Purchase Option on the Plaza property from Brockbank by letter, but the actual purchase was still conditioned upon Brockbank providing title to the property free and clear of all liens. (Ex. 66F (attached as Addendum H).) Stangl closed the loan and exercised the Purchase Option only because of Ernst's insistence on proceeding on a fast-track. (R. 3029, 4354-59.)[8]

22. Throughout July and August 1988, Ernst's conduct repeatedly indicated that the project would proceed as planned and encouraged Stangl's reliance. During July and August 1988 Ernst and Ernst's architects referred written materials and communicated with Stangl's employees regarding construction plans. (R. 3887, 3013-19, 3022-27, 3033-34, 3036, 3037-38, Exs. 17, 25, 34, 71, 72, 73, 76.) Stangl, in turn, began making arrangements necessary to meet Ernst's construction requirements and to renovate the Plaza

---

[7] Dykeman prepared the architectural renderings of the improvements Ernst required Stangl to complete prior to turning the property over to Ernst for fixturing. (Exs. 76, 71-71E, R. 3013-15.)

[8] Because Brockbank did not have clear title yet, both the Purchase Option and the Offer to Purchase remained conditional. Thus the court properly determined that Stangl had no obligation to purchase the property as of July 28, 1988. (See Finding No. 30, R. 2224.)

property. (Finding No. 25, R. 2222; see also 3018-22, 3038, Ex.7, 66, 88A.)

23. For instance, on July 8, Stangl applied to the West Jordan City Planning Commission for a conditional use permit, a site plan review and permission to locate a sign. Stangl's application indicated that the permits and review were for an Ernst store. (R. 2222, 2949, 3010, Exs. 7, 19.) To assist in obtaining a positive outcome at the Planning Commission hearing set for July 20, 1988, DuBose wrote to the West Jordan City Manger on July 12, 1988, stating Ernst's intent to consummate a lease at the Plaza property and to make "a very long commitment to the community. . . ." (Finding No. 25, R. 2222; see also 3615-16, Ex. 10.) Ernst's Director of Construction, Rob King, attended the hearing and explained Ernst's construction and remodeling requirements for the Plaza property. (R. 3887-88; Ex. 19.) On July 20, 1988, the West Jordan Planning and Zoning Commission conditionally approved the Plaza property project. (R. 3010-11, Ex. 19.)

24. On July 22, 1988, Stangl secured a bid for the new roof Ernst required. (R. 3018-19, Ex. 76.)

25. On August 2, 1988, Ernst solidified its promise to lease the Plaza property site. On that date, DuBose made two telephone calls to Steve Pruitt indicating that Jules Trump, the Chairman of the Board of Ernst, had approved the West Jordan project. (Finding No. 26, R. 2223; see also 3544-45, 3660, 4132.)

26. In reliance on the approval by Ernst's Chairman to enter into a lease for Ernst to become the anchor tenant at the Plaza

property, Stangl closed on the property on August 9, 1988.[9] At that time, Brockbank could not deliver clear title or a warranty deed because of significant tax liens on the property. Stangl waived the condition of delivery of clear title contained in the Purchase Option and the Offer to Purchase (Finding No. 30, R. 2224, Exs. 5, 315, 317, 66A (attached as Addenda D,F,G)) and paid $1,272,351.15 which was more than the option price and included payment of the outstanding taxes. (Finding No. 30, R. 2224; see also 3034-35 Ex. 66A.)

27. Stangl acted reasonably in acquiring the property in reliance on Ernst's promise to enter into a lease as the anchor tenant at the Plaza property, in light of Ernst's course of conduct and the August 2 phone calls from DuBose to Pruitt signaling that Ernst would be the anchor tenant at the Plaza property. (Finding No. 29, R. 2223; see also R. 2011.) Stangl would not have purchased the Plaza property from Brockbank, purchased Aetna's trust deed or drawn on the Valley Bank loan without Ernst's commitment to lease the property. (Finding Nos. 30 and 32, R. 2224-25; see also 2975-76, 3036, 3144, 3313, 3902-03 4354-59.) DuBose could have and should have known that Stangl would make legal and economic commitments in furtherance of the project to accommodate the requested October 1, 1988 fixturing date. (Finding No. 29, R. 2223-24; see also 4333-40.)

28. In fact, Ernst knew that Stangl was going to buy the Plaza property. Stangl discussed with DuBose his need to acquire

---

[9] Stangl needed to close the purchase then to remain on the fast track. Ernst wanted the site by October 1, 1988 and construction would take approximately 60 days, a fact Ernst knew. See ¶ 8, supra.

the property on several occasions beginning in June 1988. (R. 2960, 2966-67, 2970, 2974, 3126, 3143, 3312-13, 3778, 3780-85, Ex. 18.) Ernst also knew that Stangl was financing the lease improvements, because Pruitt had requested Ernst's financial information specifically for Stangl to provide to Valley Bank. (R. 3885, 3581, 3465, 4131-32, Ex. 18.) DuBose testified that normally Ernst addresses the question of which party would bear any pre-lease risks during lease negotiations, with Ernst placing the risk on the developer. (Finding No. 29, R. 2224, 3142, 3311-12.) It did not do so in this case. (Finding No. 29, R. 2224.) Its failure to do so indicated that it understood Stangl was not acting at his own peril in obtaining financing, securing permits, and advancing with the construction.

29. On August 23, 1988, DuBose sent Stangl a copy of a revised lease which he indicated Ernst was "prepared to execute." (Ex. 26.) That statement was false. Ernst was not convinced of the project's economic feasibility. (Finding No. 32, R. 2225; see also 3670-79.) Ernst secretly intended to condition its commitment to execute the lease on being "satisfied" of the project's feasibility. (R. 3039, Ex. 26.) Ernst never revealed any feasibility concerns or contingencies to Stangl. (Finding No. 32, R. 2225, 3673, 3674, 3677.)

30. Instead, Ernst continued to represent to Stangl that it wished to proceed with the West Jordan project on a fast-track basis with a fixturing date of October 1, 1988 and acted in accordance with those representations. (Finding No. 33, R. 2225.) Ernst's architects continued to refer written construction materials to Stangl, who continued working towards the October 1,

1988 deadline. (Finding No. 33, R. 2225; see also 3036-37, 3043, Ex. 25, 75.)

31. On August 29, 1988, Stangl responded to DuBose's August 23, 1988, letter and requested changes to the August 23 draft lease. (Ex. 27.) Stangl did not anticipate that his proposals would in any way jeopardize the project. (Finding No. 34, R. 2225; see also 3042, 3828-32.) By this time, based on his prior communications and dealings with Ernst, this conclusion was entirely and reasonably justified. (Finding No. 34, R. 2225.)

32. On September 12, 1988, DuBose responded to Stangl's August 29, 1988 correspondence. (Finding No. 35, R. 2226, Ex. 29.) In his letter, DuBose specifically addressed each of Stangl's proposed changes. He stated that several issues were unresolved, that there was a risk negotiations would terminate if those issues could not be resolved, and scheduled a September 14, 1988 meeting with Stangl in Salt Lake City. (Ex. 31.) DuBose's September 12, 1988 letter was the first indication from Ernst that the project might be in jeopardy. (Finding No. 35, R. 2226.)

33. Just before September 14, DuBose tendered his resignation from Ernst. (R. Finding No. 36, 2226; see also 3561.) DuBose did not inform Stangl he was leaving Ernst, and attended the September 14 meeting with Stangl along with Ellis Kantor, DuBose's replacement at Ernst. (Finding No. 36, R. 2226; see also 4135.)

34. The September 14 meeting focused on five matters which had not previously taken on much significance. (Finding No. 37, R. 2226; see also 3050-64, 3124, 4135, Exs. 29, 329.) Neither DuBose or Kantor mentioned any concerns about the economic viability of the project. (R. 3136.) At the meeting Stangl, stated his

preference concerning the five issues but indicated that if Ernst insisted, he would agree to resolve each of the five issues as Ernst proposed. (Finding No. 38, R. 2226-27; see also 3052-53, 3124-38, 4135-36.) Because Stangl indicated he would accede to Ernst's demands on the remaining five issues if it insisted, he reasonably believed that there were no terms remaining to be negotiated at the end of the September 14 meeting, and he reasonably expected to receive an acceptable lease from Ernst by September 23, 1988. (R. 2227, 3052-53- 3138-39, 3891-93, 4136, 4158-59.)

35. On September 15, 1988, DuBose terminated his employment with Ernst. (Finding No. 39, R. 2227.) On or about that same date, Thomas Stanton, Ernst's senior Vice-President of Operations, told Kantor that the Plaza property project had been placed on hold. (Finding No. 39, R. 2227, 4001.) Ernst did not diligently pursue preparation of lease documents after that point. (R. 4024.)

36. Stangl called Ernst on September 23, 1988, to inquire about the lease. (Finding No. 40, R. 2227; see also 3144, 3313-14.) At that time, Stangl was informed that DuBose no longer worked for Ernst. Kantor and Stanton both informed him that all of DuBose's projects were on hold. (R. 3163, 3145-50, 3314-16 4046.) Neither Stanton or Kantor indicated any problems with the lease terms as agreed. (R. 3145-50, 3316.)

37. By letter dated September 29, 1988, Ernst, through Stanton, formally notified Stangl that Ernst did not intend to be a tenant in the Plaza property. (Ex. 35.) Stanton subsequently told Stangl that the only reason Ernst was not proceeding with the lease was the low volume numbers in the feasibility study prepared

for Ernst in 1987. (R. 3166, 4099-4100); see also (4086-93, 4095-96.) At no time prior to September 29, 1988 did Ernst inform Stangl or Pruitt of the existence of the 1987 feasibility study, or that execution of a lease by Ernst was conditioned upon Ernst's satisfying itself of the feasibility of the project. To the contrary, all the essential lease terms had long been agreed upon, construction drawings and specifications had been given to Stangl, the Chairman of the Board had approved the project, Ernst actively participated in obtaining city approval and had represented to the city its intent to lease the Plaza property site. (R. 3580, 3674, 3825-26, 4137-38.)

38. Ernst knew that Stangl would be required to take out loans and incur costs and irreversible obligations in order to proceed with the project and meet Ernst's fast-track requirements. (R. 3143, 3312-13, 3885, 3581, Ex. 12.) At no time did Ernst indicate its commitment to enter into a lease was conditional upon a satisfactory feasibility study or that Stangl would bear the risk if the project fell through. (R. 3142, 3515, 3826-27.) Ernst requested that Stangl take action quickly to comply with its fast track timetable, and Stangl complied.

39. When Stangl received Stanton's September 29 letter, he found himself in a difficult position. Stangl had purchased the Plaza property, taken out substantial loans for such purchase, pledged other income producing properties and leases as collateral for such loans, made improvements and begun construction consistent with Ernst's stated requirements, all in reliance of Ernst's promise to enter into a lease as anchor tenant for the Plaza property. (Finding No. 42, R. 2227; see also 3142-45, 3152-59,

3258-59, 3320-27, 3902-04 4360-61, Ex. 88A.) Stangl had had no reason to believe that a lease could not be agreed to, given Ernst's course of conduct since June 29.[10]

40. From October 1988 through April 1989, Stangl continued to work with Ernst in an attempt to continue to convince Ernst to become the anchor tenant. (R. 3894-96, 3901-02, 3430.) Ernst's conduct throughout that period indicated that it had not definitively withdrawn from the deal. (R. 4005-06, 4049-55, 4104, 3894-96, 3360-62, 3321-22, 3331-47, 3243-44, 3335, 3164-73, 3177-84, Exs. 38, 43.) Stangl reasonably continued to renovate the property with the justifiable hope that Ernst would reconsider and become a tenant. (Finding No. 43, R. 2227-28.)

41. Also beginning in October, 1988, Stangl prudently attempted to find new tenants or a purchaser. (Findings No. 44, R. 2228; see also 3189-90, 3893-94, 4390-91, 4394, 4407-9.)

42. Valley Bank agreed with Stangl's decision to complete the renovations (R. 3889-90, 3483-84), believing this was the only way the property could attract another anchor tenant or interest a potential purchaser. (Finding No. 43, R. 2227-28; see also 3152-54, 3164-73, 3177-84, 3322-27, 3331-47, 3903-04, 4393.) Continuing with the renovations was reasonable in light of the fact that the prior owner of the property had been unable to sell it for several years due to its deteriorating condition, the Plaza property had to compete for tenants with two new shopping centers located nearby, Stangl had pledged his two adjacent properties and related leases as security for the Valley Bank loan to acquire the Plaza property,

---

[10] See, e.g., paragraphs 9, 10, 14, 15, 18, 20, 22, 23, 25, 28, 29 and 30 and 29 above.

and Stangl was incurring substantial interest expense on the loan he obtained to purchase the property. (Finding No. 43; R. 2228; see also 3155, 3902-04, 3503, 3259-69.) All said, Stangl expended over $2.2 million in acquiring the Plaza property in order to meet Ernst's fast-track requirement, and, after taking reasonable steps to convince Ernst to meet its prior commitment, and/or in mitigating his damages by completing renovations to attract new tenants or a purchaser. (Finding No. 45, R. 2228, Ex. 88A.)

43. Stangl was finally able to sell the Plaza property on March 8, 1991, along with the two adjacent out-parcels he owned, to Green Isle Development Corp. (Finding No. 45, R. 2228; see also 3189; Ex. 48 (attached as Addendum J).)

44. The court determined that although no contract was formed, the elements of promissory estoppel existed. (R. 2229-30.) The court held that Stangl reasonably, substantially and detrimentally relied upon Ernst's representations that it would enter into a lease to become the anchor tenant at the Plaza property, with remodeling to be done and possession to be taken on a fast-track basis and that Stangl was entitled to recover his out-of-pocket expenses (R. 2229-32). The court did not award Stangl a breach of contract measure of damages. (R. 2232.) Stangl's out-of-pocket expenses were measured by the amounts Stangl incurred in acquiring and refurbishing the Plaza property to make it marketable, less rental income he received from other tenants and the sale price allocable to the Plaza property when Stangl sold it and his two other adjacent out parcels. (Finding No. 46, R. 2228-29.) The trial court found that Stangl's damages were $331,391, having

reduced them from the $407,309 Stangl claimed he was due. (Finding No. 48, R. 2229, Ex. 88A (attached as Addendum K).)

SUMMARY OF ARGUMENT

Ernst has utterly failed to apprise this court of the true nature of the factual evidence presented to the trial court. Instead, Ernst purposefully cites only selected facts in an effort to retry the case and give a false impression of the case to this Court. Ernst challenges the trial court's findings without reference to any of the voluminous evidence which supports those findings. A quick review of the trial court's findings and Ernst's "Statement of Facts" shows the total incongruence between the two. Ernst's determination to reargue the case without marshaling the evidence which supports the trial court's findings is fatal to Ernst's factual challenges it raises in points VII. B, VII. C, and VII. E. Pasker, Gould, Ames & Weaver, Inc. v. Morse, 887 P.2d 872, 875 (Utah App. 1994).

Viewing the facts as a whole, it is clear that the trial court ruled correctly on all issues on appeal and should be affirmed. The trial court correctly determined that promissory estoppel is available for use as a theory of recovery notwithstanding the Statute of Frauds, and that the facts merit its application here. In addition, the trial court employed an appropriate measure of damages under the promissory estoppel claim which avoided injustice in this case, and acted well within its discretion in carefully considering all of Ernst's objections, evaluating the evidence for possible prejudice and rendering well thought out decisions as to the admissibility of each piece of evidence to which Ernst objected. The record clearly supports the trial court's legal

rulings, and Ernst has not supported, and cannot support, its contention that the trial court acted erroneously or abused its discretion. The decision below should be affirmed.

ARGUMENT

When reviewing the trial court's decision on appeal, the Utah Court of Appeals will "presume [the decision] to be correct and search for grounds upon which [it] may be upheld." Allen v. Prudential Property & Casualty Ins. Co., 839 P.2d 798, 800 (Utah 1992). Therefore, the Court of Appeals will affirm "a trial court's decision whenever [it] can do so on a proper ground . . . ." Bill Nay & Sons Excavating v. Neeley Constr. Co., 677 P.2d 1120, 1123 (Utah 1984). The record in this case establishes that the trial court's decision was correct on the grounds upon which it was made. The trial court's judgment must therefore be affirmed.

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT PROMISSORY ESTOPPEL IS AN AVAILABLE REMEDY IN THIS CASE.

Promissory estoppel provides an appropriate basis for recovery in this case.[11] Ernst's argument to the contrary misstates Utah law on the applicability of promissory estoppel in cases involving the Statute of Frauds. The very cases on which Ernst relies show

---

[11] It is important to note initially that Ernst mixes up Stangl's two estoppel claims to serve its purposes on appeal. Stangl presented two separate promissory estoppel claims to the trial court. In connection with his breach of contract claim, Stangl argued that Ernst was estopped from denying the existence of an enforceable lease contract. This argument was extinguished by the court's finding that no contract actually existed. Stangl's second promissory estoppel claim, on which the court awarded judgment, did not depend on the existence of a binding contract. Stangl argued, and the court agreed, that justice requires that Ernst be held liable for its promise to Stangl that it would enter into a mutually acceptable lease consistent with Ernst's fast track construction schedule. This promissory estoppel claim is rooted in equity and all analysis must be conducted with equitable principles firmly in mind.

the fallacy of its argument. For example, McKinnon v. Corporation of the President of the Church of Jesus Christ of Latter Day Saints,, 529 P.2d 434, 436 (Utah 1974) as quoted by Ernst, acknowledged that the Utah courts have long accepted that promissory estoppel extends to cases involving the Statute of Frauds. (See App. Brf. at 17).[12]

In reaching its decision, the trial court relied on Medesco v. LNS International, 762 F. Supp. 920 (D. Utah 1991), a diversity case applying Utah law. In Medesco, Judge Winder rejected the defendants' claims that promissory estoppel was unavailable to plaintiffs bringing a state securities law claim because of the Statute of Frauds. The defendants had argued that the list of exceptions in the Statute of Frauds applicable to contracts for securities sales is exclusive and bars any "judicially created exceptions." 762 F. Supp. 920. Judge Winder held that the decision as to whether a party is promissorily estopped from asserting the Statute of Frauds is not precluded by the Statute, and involves the balancing of a number of different policies. 762 F. Supp. at 926. Restatement (Second) of Contracts, § 139, said Judge Winder, provides the appropriate analytical framework within which to weigh these policies. Id.[13] Ravarino v. Price, 260 P.2d

---

[12] The quoted passage provides that

> In Easton v. Wycoff, 295 P.2d 332 (Utah 1956), this court stated that the doctrine of promissory estoppel had been extended, in a limited form, to those cases concerned with the Statute of Limitations or the Statute of Frauds, where the promise as to future conduct constituted an intended abandonment of an existing right of the promisor.

Id. at 436 (emphasis added).

[13] Section 139 provides that:

(continued...)

570 (Utah 1953), Easton and McKinnon (the cases upon which Ernst primarily relies) "are now dated by the Utah Supreme Court's adoption of § 90 of the Restatement (Second) of Contracts and the policy of justifiable reliance that underlies this section."[14] Medesco, 762 F. Supp. at 925. See also Andreason, 848 P.2d at 175 n.1.

Ernst contends that this court must disagree with Medesco, and instead rely on Ravarino, Easton and McKinnon. Not only did Medesco distinguish those cases, they have also been superseded by the Utah Supreme Court's adoption of Restatement (2d) of Contracts § 90 in Southeastern Equip. Co. v. Mauss, 696 P.2d 1187 (Utah

---

[13](...continued)

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy for breach is limited as justice requires.

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;

(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;

(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;

(d) the reasonableness of the action or forbearance; and

(e) the extent to which the action or forbearance was foreseeable by the promisor.

[14] Judge Winder also questioned the precedential value of the cases because of the way in which they confused the doctrines of equitable estoppel and promissory estoppel. Id. at 925, n.8.

1985). Ravarino, Easton and McKinnon all applied an early, narrower form of promissory estoppel.[15] The Restatement (Second) of Contracts § 90, adopted in Mauss, modified and provided a more flexible approach to the manner in which Utah applies the doctrine of promissory estoppel. Id. at 1188; see also Andreason, 848 P.2d at 175 & n.1 (noting that Restatement (Second) of Contracts § 90 "infused a more flexible approach into both the substantive and remedial aspects of promissory estoppel").

In any event, none of the older cases on which Ernst relies rejected outright the use of promissory estoppel in all cases subject to the Statute of Frauds. See Medesco, 762 F. Supp. at 925 n.7 (pointing out that none of the plaintiffs in the three cases, Ravarino, 260 P.2d 570, Easton, 295 P.2d 332 and McKinnon, 529 P.2d 434, appeared to have suffered any reasonable, detrimental reliance as a result of the defendants' oral promises, and therefore, although promissory estoppel was available, it was simply not applicable in those cases); see also Andreason 848 P.2d at 175 n.1 (noting the availability of the promissory estoppel in certain situations). Rather, Utah has long recognized that a party to a contract otherwise subject to the Statute of Frauds might obtain equitable relief pursuant to the doctrine of promissory estoppel in

---

[15] It is important to note at this point that the majority of cases cited by Ernst to support its position on the application of promissory estoppel to this case were decided under an older promissory estoppel standard no longer applied by Utah courts. Promissory estoppel has evolved from a narrow doctrine requiring a specific and definite promise, in part because full contract damages were generally awarded, to return to its equitable roots in which courts focus not on the definiteness of the promise, but on the promissory commitment, centered on the promisee's right to rely and the promisor's duty to prevent foreseeable reliance. Id. pp. 38-58. For a lengthy discussion of the evolution of promissory estoppel see Corbin on Contracts § 8.11 (Rev'd Ed. 1993).

an appropriate situation. In addition, Utah courts have historically enforced oral contracts for an interest in land notwithstanding the Statute of Frauds. See, e.g., Fisher v. Fisher, 907 P.2d 1172, 1176-77 (Utah App. 1995) (oral modification to written escrow agreement enforceable notwithstanding the Statute of Frauds § 25-5-3 when appellees changed their position and partially performed in reliance on the oral modification); Budge v. Barron, 169 P. 745, 748 (Utah 1917) (upholding oral rescission of a written contract for the sale of land when the seller, in reliance on the rescission, enters into a new contract to resell the land).[16]

Moreover, Medesco's application of Section 139 is consistent with the holdings of many other jurisdictions which recognize that promissory estoppel may, in appropriate cases, allow a plaintiff to recover notwithstanding the Statute of Frauds.[17] In McIntosh v.

---

[16] See also Bennett Leasing Co. v. Ellison, 387 P.2d 246 (Utah 1963) (holding that the fact that the parties unsuccessfully attempted to complete written contract does not foreclose the possibility that other contractual obligations could arise between them in equity in quantum meruit notwithstanding the Statute of Frauds); Jacobson v. Cox, 202 P.2d 714 (Utah 1949) (finding enforceability of a contract for an interest in land based on equitable estoppel notwithstanding the Statute of Frauds); Carnesecca v. Carnesecca, 572 P.2d 708, 710-11 (Utah 1977) (notwithstanding the Statute of Frauds, to prevent unjust enrichment, equity will impress a constructive trust in favor of a beneficiary of an oral trust under certain circumstances despite the absence of a writing evidencing an intent to create such a trust).

[17] Promissory estoppel has been widely applied by other state courts in cases in which it would be inequitable to allow the Statute of Frauds to defeat an otherwise meritorious claim. See e.g., Chidester v. Eastern Gas and Fuel Assoc., 859 P.2d 222, 224-25 (Colo. App. 1992) (citing section 139); Nicol v. Nelson, 776 P.2d 1144, 1147 (Colo. App. 1989), cert. denied, 785 P.2d 917 (Colo. 1989)(applying section 139(1) to the statute of frauds governing real property); Kiely v. St. Germain, 670 P.2d 764 (Colo. 1983)(considering the statute of frauds governing sale of securities and citing § 139 with approval); Warder & Lee Elevator, Inc.
(continued...)

Murphy, 469 P.2d 177 (Hawaii 1970), the court made a comprehensive analysis of modern law and applied Section 139[18] to enforce an oral employment contract notwithstanding the Statute of Frauds. The court found that Section 139 gave the trial court the necessary flexibility to relieve a party of the Statute of Frauds when the party's reliance is such that injustice can be avoided only by enforcing the promise. Id. at 180-82.

In contrast, none of the jurisdictions Ernst says have refused to adopt Restatement (2d) of Contracts § 139 despite their application of Section 90 have actually gone so far. First of all, only two of the cases cited by Ernst, Greaves v. Medical Imaging Systems, Inc., 879 P.2d 276 (Wash. 1994) and Stearns v. Emery-Waterhouse Co., 596 A.2d 72 (Maine 1991), actually considered applying Section 139 to the facts before them. Neither of those courts foreclosed future adoption of the section; they merely declined to adopt Section 139 under the facts of the particular employment cases under consideration. The other case Ernst relies

[17] (...continued)
v. Britten, 274 N.W.2d 339, 342 (Iowa 1979) (holding that in Iowa promissory estoppel is a valid nonstatutory exception to the applicable Statute of Frauds and applying § 139); Walker v. Ireton, 559 P.2d 340, 344-346 (Kansas 1977) (adopting Tentative Draft of 139 based on its review of the courts historical lean on the equitable doctrine of reliance and its specific recognition and application of § 90 to other cases); Crail v. Blakely, 505 P.2d 1027 (Calif. 1973); McIntosh v. Murphy, 469 P.2d 177 (Hawaii 1970)(applying § 139 in Tentative Draft to enforce an oral employment contract notwithstanding its violation of a strict interpretation of the applicable Statute of Frauds); Babey v. Lowman, 218 N.E. 2d 626 (Ohio 1966); Alaska Airlines v. Stephenson, 217 F.2d 295 (9th Cir. 1954). See also Calamari & Perillo, The Law of Contracts § 19-48, 841-44 & n. 68 (and cases cited therein).

[18] Then in tentative draft form.

on, Farmland Serv. Coop, Inc. v. Klein, 244 N.W.2d 86 (Neb. 1976) did not even consider Section 139.[19]

Ernst argues that where, as here, the parties specifically anticipated a written agreement, enforcing an oral promise will "render the statute meaningless."[20] (See Ap. Brf. at 22-24.) That argument ignores both the broad equitable sweep of modern promissory estoppel law in Utah and the purpose of the Statute of Frauds. The Statute of Frauds exists to prevent fraud and perjury by requiring certain contracts to be in writing. English v. Standard Optical Co., 814 P.2d 613 (Utah App. 1991). That purpose is in no way eviscerated by the appropriate application of the doctrine of promissory estoppel to cases involving the Statute of Frauds.[21] Application of Section 139 does not result in the automatic "enforcement" of contracts barred by the Statute; it does not bind parties to terms they are merely negotiating. Rather, Section 139, in conjunction with Section 90, provides the court with a necessary

---

[19] In addition, Ernst incorrectly cites Schwedes v. Romain, 587 P.2d 388 (Mont. 1978) as stating the philosophy of the cited jurisdictions. Schwedes was decided prior to the second Restatement's adoption of § 139. In Trad Industries Ltd. v. Brogan, 805 P.2d 54 (Mont. 1991), the Montana Supreme Court applied promissory estoppel to preclude the defendant from asserting the Statute of Frauds, where the plaintiff reasonably and foreseeably relied on defendant's representations to his detriment and injustice could be avoided only by enforcement of the promise. Id. at 59.

[20] To make this argument, Ernst relies on a clause in a letter it sent to Stangl; a letter that Ernst itself argues did not form a binding contract, and to which Ernst objects to being bound.

[21] It is certainly not eviscerated in this case, where West Jordan public records indicated Ernst was making a long-term commitment to the community, where Ernst's architects were supplying necessary drawings to have the property improved in time for fixturing by October 1, where Ernst supplied its financial statements knowing that Stangl was obtaining financing to acquire the property, and where Ernst established the fast-track timetable.

and proper equitable method to prevent injustice when one has reasonably and detrimentally relied on a promise which otherwise does not rise to the level of an enforceable contract. There must be a definite promise as well as reasonable reliance. These elements were missing in the cases cited by Ernst. Moreover, recovery under Section 139 depends not on the consideration stated in the unenforceable contract, but is governed by the court's finding of what justice requires.[22]

Utah recognizes that equitable principles demand that, under certain circumstances, where a promisor has induced another party to do acts pursuant to and in reliance upon the promise, and as a result, the promisee has suffered unjust detriment, the doctrine of promissory estoppel will be used to make the promisee whole. See, e.g., Andreason, 848 P.2d at 174-75. Section 139 reconciles the public policy behind that equitable principal with the public policy underlying the Statute of Frauds. See McIntosh v. Murphy, 469 P.2d 177, 180 (Hawaii 1970) (explaining the policy behind enforcing agreements which violate the Statute of Frauds as a policy of avoiding unconscionable injury). The Medesco ruling is a logical application of the rule announced in Mauss, McKinnon and other Utah cases; it does nothing to weaken the Statute of Frauds.[23] The trial court properly followed Medesco in concluding

---

[22] Here, for example, the court specifically refused to enforce the 25 year lease contract, and instead awarded Stangl his out-of-pocket expenses. Thus, the Statute of Frauds remains alive and well, untouched by the trial court's ruling in this case.

[23] Ernst argues that because no Utah state court has specifically adopted Section 139 in a reported case, this court must reverse the trial court. As shown above, however, notwithstanding Utah's seemingly strict application of the Statute of Frauds, Utah courts (continued...)

that "promissory estoppel may be invoked [in this case] to bar the application of the Statute of Frauds." (R. 2012.) This Court should affirm the trial court's adoption of the rule stated in that case.

II. BECAUSE ERNST FAILED TO MARSHALL THE FACTS, IT CANNOT NOW ARGUE THAT THE TRIAL COURT ERRED IN ITS FINDINGS OF FACT.

Ernst attempts to portray its appeal as one based on legal issues or, at least, mixed questions of law and fact. Ernst's reasoning is clear: while conclusions of law are reviewed de novo, findings of fact may not be set aside unless found clearly erroneous. Interiors Contracting v. Smith Halander, 881 P.2d 929 (Utah App. 1994)(citing Utah R. Civ. Pro. 52(a)). Ernst's factual challenges permeate its legal arguments, however, demonstrating that its real complaint against the trial court's decision is that Ernst simply does not agree with the trial court's findings of fact.

Ernst challenges four basic findings of the court: Ernst had requisite awareness of Stangl's acts in reliance; Ernst made a sufficiently definite promise to enter into a lease agreement with remodeling and improvements to occur on a fast-track basis; Stangl purchased the property in reasonable reliance; and Stangl suffered detrimental damages. To support its claims that the court erred in reaching these conclusions, Ernst cites to carefully selected portions of the record that reflect not the facts as the court found them to be, but the facts as Ernst *wishes* they were. No

---

[23](...continued)
have long recognized the applicability of promissory estoppel to cases within the Statute of Frauds.

where does Ernst attempt to marshall the evidence that supports the court's findings to show that such evidence is insufficient.[24]

Utah appellate courts are very clear about the burden an appellant must meet when challenging a trial court's findings of fact. "To successfully challenge a trial court's findings of fact on appeal, '[a]n appellant must marshall the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.''" Ohline Corp. v. Granite Mill, 849 P.2d 602, 604 (Utah App. 1993); accord, Interiors, 881 P.2d at 933 (holding that the trial court's findings were supported by sufficient evidence when appellant failed to include evidence supporting trial court's findings in its brief and set fourth only evidence supporting his position); West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313, 1315 (Utah App. 1991) (requiring one challenging factual findings to "present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists" (emphasis in original)); Turnbaugh v. Anderson, 793 P.2d 939, 944 (Utah App. 1990).[25]

---

[24] Even a quick comparison of the court's findings of fact and Ernst's "Statement of Facts" in its brief demonstrates Ernst's lack of candor on this point. The lack of congruence between the two is nothing short of amazing.

[25] Utah's appellate courts have repeatedly refused to consider the arguments of appellants who have failed to marshal the evidence which they were required to do so. See Commercial Union Assocs. v. Clayton, 863 P.2d 29, 36 (Utah App. 1993) (appellate court "will assume that the record supports the trial court's findings" where appellant fails to marshal evidence); Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 553 (Utah App. 1989) ("When the duty to marshal is not properly discharged, we refuse to consider the (continued...)

Ernst's failure to marshall the evidence in favor of the trial court's decision requires this court to reject Ernst's factual challenge. Therefore, this court must accept as true the trial court's findings that (1) Ernst had the requisite awareness of Stangl's acts in reliance (Finding No. 29; R. 2223); (2) Ernst promised through its words and conduct that it would enter into a lease with remodeling to be done and possession taken on a fast-track basis (R. 2219-23, Finding Nos. 17, 18, 19, 22, 25, 26, 29); (3) Stangl purchased the Plaza property in reliance upon Ernst's promise (Finding Nos. 16, 29, 30; R. 2218-24); and (4) that Stangl suffered detrimental damages as a result of his reliance totaling $331,391. (Findings 42, 43, 44, 46, 47, 48; R. 2227-29.) Because these findings support the court's application of promissory estoppel, the trial court's decision must be affirmed.

III. THE EVIDENCE BEFORE THE TRIAL COURT CLEARLY SUPPORTS THE COURT'S APPLICATION OF PROMISSORY ESTOPPEL.

As shown above, this court must accept the trial court's findings as true. In any event, however, the record firmly establishes that the evidence at trial sufficiently supports the challenged findings. The court's findings, in turn, support its conclusion that all elements required for promissory estoppel were established in this case.

---

[25](...continued)
merits of challenges to the findings and accept the findings as valid."); accord Phillips v. Hatfield, 904 P.2d 1108, 1109 (Utah App. 1995); Lake Philzas Serv. v. Valley Bank, 845 P.2d 951, 959 (Utah App. 1993).

A. Ernst was aware of all facts material to the agreement.

Promissory estoppel requires only knowledge of the fact that the injured party will perform, not the details of how it will do so. If the promisor should reasonably have expected its promise to induce action or forbearance, then the promisor will be held liable for all acts or forbearance reasonably resulting from such reliance. See, Sanders v. Arkansas Missouri Power Company, 593 S.W.2d 56 (Ark. App. 1980) ("as long as the action in reliance on a promise is reasonable it matters not that the action taken was not directly induced by the promise sought to be enforced."); see also Restatement (2d) Contracts §§ 90, 139 (requiring only foreseeability, not that the actual reliance was foreseen); Corbin on Contracts § 8.12, pp. 73-74 (explaining that reasonable foreseeability of injurious reliance is an important factor but actual foreseeability is not required). Cf. Union Tank Car Co. v. What Bros., 387 P.2d 1000, 1002-03 (Utah 1964)(equitable relief not available where defendant subcontractor entered bid based on ordinary paint but project required special expensive paint, a fact which plaintiff never made defendant aware).

Finding 29 is sufficient to establish the foreseeability of Stangl's acts in reliance on Ernst's promise to lease such property. In Finding 29, the court stated:

> On August 9, 1988, Stangl closed on the purchase of the Plaza property from Brockbank. In light of the August 2 calls from DuBose to Pruitt and all that had proceeded before that time, this was a reasonable step in furtherance of what DuBose had signaled and represented, i.e., that Ernst would be the anchor tenant at the Plaza property. While DuBose could not have anticipated this precise step, he could have and should have reasonably anticipated that Stangl would make legal and economic commitments in furtherance of the project to accommodate an October 1 possession date. DuBose himself testified that normally the question of risk bearing for pre-lease

expenditures is addressed during negotiations. That was not the case here.

(R. 2223.)

The evidence presented at trial supports a finding that Ernst should have known that Stangl was purchasing and financing the Plaza property in reliance on Ernst's promise to lease such property.[26] (R. 2960, 2966-67, 2970, 2974, 3126, 3143, 3885, 3581, 3465, 4131-32.) Stangl testified that he discussed purchasing and financing the Plaza property with DuBose on several occasions, beginning in June 1988. (R. 3885, 3581, 3465.) (R. 3312-313.) (R. 3778, 3780-85.) Moreover, Ernst expedited the transfer of its financials to Pruitt when Pruitt told DuBose that Stangl needed them to secure financing. (R. 3778, 3780-85.) In addition, Ernst's involvement in the permitting process and providing Stangl with construction drawings demonstrates its knowledge of Stangl's progress along the fast track required by Ernst. (See Finding Nos. 25 and 33.)

The trial court found and concluded, and the record supports, that Ernst should have known that Stangl would perform substantial acts in reliance upon Ernst's promise. Thus, Ernst possessed the requisite knowledge of all facts material to its promise to enforce a promissory estoppel claim.

---

[26] Ernst's focus on Pruitt's June 3, 1988 letter is a red herring. It ignores clear testimony that in the course of communications Ernst became aware that Stangl did not own the property and was purchasing it and financing the improvements with the expectation that Ernst would be the anchor tenant. See Statement of Facts at ¶¶ 27 and 28, supra.

B. The trial court correctly found that Ernst promised to lease the Plaza property site and that such promise fit within the doctrine of promissory estoppel.

A "promise" is an expression of a commitment to act in a specific manner communicated in such a way that the person to whom it is addressed may justly expect performance and may reasonably rely thereon. Corbin on Contracts § 1.13 (Rev'd Ed. 1993)[27]. A promise may be made through words or conduct; it may be implied, tacit, inferred or express. Id. "If a person has reason to know that his or her words or other conduct may reasonably cause another to believe that a promise is being made and such belief actually results, a promise has been made even though the speaker or writer of the words does not intend to convey such meaning." Id. at 37 & n.4.

Here, the trial court found, and the evidence shows, that Ernst promised to enter into a mutually acceptable lease agreement with Stangl, with remodeling and other improvements to the Plaza property to be done on a fast-track basis, concurrent with the final lease negotiations. (Finding Nos.17-26, R. 2219-23, see also R. 2230-31.) The court's findings of fact 17 through 26 set forth the course of events culminating with DuBose's call to Pruitt on August 2, signalling that Ernst would be the anchor tenant at the Plaza property. (Finding No. 29, R. 2219-23; see also 2011.) Ernst argues that because the lease negotiations were ongoing, it could not have made an enforceable promise prior to having a final

---

[27] All subsequent citations to Corbin on Contracts refer to the third revised edition.

written document.[28] This argument is another red herring. The court did not enforce *any* actual lease terms, having found that no oral or written agreement had been reached. It compensated Stangl for his out-of-pocket losses incurred in reasonable reliance upon Ernst's promise to enter into a lease with the essential business terms to which the parties had agreed as early as June, 1988:

> Beginning with its June 29 letter, Ernst set the negotiations on a course such that any reasonable lessor should reasonably expect Ernst to be bound by a mutually acceptable "Offer to Lease" containing the significant business points. Even though Ernst's form of an "Offer to Lease" expressly contemplated a subsequent, written lease, Ernst's language and conduct indicated that the subsequent lease would resolve only the less significant matters not addressed in the "Offer to Lease." Furthermore, it was reasonable to conclude that any items not raised in Ernst's June 29 or July 8 letters were not significant. Ernst should have reasonably anticipated that Stangl would draw these same conclusions. There is no reason to believe that Stangl and Ernst would not have reached agreement on all lease points.

(Conclusions No. 2; R. 2230.) The court found that Ernst's representations and conduct justified Stangl's reliance. (R. 2230-31.) In considering the evidence, the trial court properly focused on Ernst's representations and course of conduct, in particular, Ernst's requirement of a fast-track construction schedule. The facts support the court's finding that Ernst promised to enter into

---

28 R.J. Daum Constr. Co. v. Child, 247 P.2d 817 (Utah 1952), on which Ernst relies is inapplicable to the case at bar because it was decided under the First Restatement of Contracts, and because it involved a contractor/subcontractor dispute, a situation in which the doctrine is uniquely applied. John Price Associates, Inc. v. Warner Electric, Inc., 723 F.2d 755, 757-58 (10th Cir. 1983) (promissory estoppel prevents a subcontractor from withdrawing its bid after a general contractor relies on the subcontractor's bid in computing and submitting its bid for a general contract). Daum declined to apply promissory estoppel in reverse - i.e., to force a general contractor who used the subcontractor's price in making his bid to actually award the work to that subcontractor. Use of a bid is not an acceptance of it or a promise to accept it, said the court.

a lease with Stangl with remodeling and possession to occur on a fast-track basis.

C. Stangl purchased the Plaza property in reasonable reliance upon Ernst's promise.

The trial court considered and rejected Ernst's argument that Stangl was legally obligated to purchase the Plaza property prior to August 2, 1988, and thus did not purchase it in reasonable reliance on Ernst's promise.[29] The court found, based on all the evidence, that (1) Stangl was not obligated to close the deal on the purchase of the Plaza property from Brockbank until August 9, 1988, after he was assured by DuBose's August 2 representations that Ernst was committed to the deal (Finding No. 29, R. 2223); and (2) "Had Stangl known that Ernst would not lease the anchor space at the Plaza property, he could have declined to purchase the Plaza property and the Aetna trust deed, and he could have aborted the financing package obtained from Valley Bank" (Finding No. 30, R. 2224).

The evidence presented to the court, by way of documents and testimony, supports the court's findings. Prior to Stangl's negotiations with Ernst, Aetna had not called in Stangl's guarantee of the Brockbank loan (R. 3420, 3926, 3930) nor did it ever indicate an intent to do so. Stangl testified that he positioned himself with the ability to purchase the Plaza property, and finally did purchase it, only because of Ernst's representations

---

[29] Ernst also claims the fact that the parties continued working toward a final lease agreement after that date negates Ernst's August 2, 1998 statements as a promise. Even before August 2, 1988, however, the major terms were fixed and never changed; nor did Ernst's apparent intent to go forward on the fast-track ever change. (Finding No. 25).

and conduct indicating that it was committed to becoming the Plaza property anchor tenant. (R. 3877-78, 3421-23, 3029, 4354-59, 4355, 2975-76.) In addition, Hoffman, the Valley Bank employee in charge of the Plaza property loan, indicated his understanding that Stangl was purchasing the Plaza property because Ernst had agreed to become anchor tenant. He testified that the loan would not have been extended without the understanding that Ernst would be the anchor tenant. (R. 3421-24.)

Furthermore, both the Purchase Option (Ex. 5 (Addendum D)) and Offer to Purchase (Exs. 315, 317 (Addenda F & G)) conditioned Stangl's obligation to consummate the Plaza property purchase on transfer of clear title. (Exs. 5, 66F (Addendum H).) On August 2, 1988, it was clear that because of significant tax liens, Brockbank could not deliver clear title.[30] (R. 4355-60, Exs. 5, 66A (Addendum I), 66F.) Thus, the court properly recognized that Stangl could have "aborted" the deal. It was only because of Ernst's promise to lease the premises that Stangl waived his contractual rights and purchased the Plaza property and the trust deed on August 9, 1988, still subject to tax liens. Thus, the court found, Stangl was not obligated to purchase the property or the trust deed prior to August 9 and did so only in reliance on Ernst's promise to complete lease negotiations.

---

[30] Ernst erroneously alleges that because Stangl previously contemplated the existence of outstanding tax liens on the property he could not have purchased the property in reliance on Ernst's promise. To the contrary, it clear that Stangl realized that the condition of clear title to the property might not be met by Brockbank, but if provided reasonable assurance that Ernst would lease the anchor space, Stangl was ready to waive the "clear title" requirement, pay off Brockbank's delinquent taxes and acquire clear title to the property, in reliance upon Ernst's promise to lease the anchor space.

Ernst also argues that Stangl's purchase of the property in reliance upon Ernst's promise was not reasonable considering the parties' insistence on a written and executed lease agreement. Once again Ernst erroneously focuses on a red herring and ignores Ernst's representations and conduct, both leading up to and following its promise, that continually pushed Stangl onto a fast-track to build its space. Ample evidence exists, from which the court properly found that Stangl's reliance was reasonable. Even though no written lease had been prepared, Ernst represented that it needed the property ready for fixturing by October 1, 1988; knew that substantial construction needed to be performed and that it could likely not be completed if Stangl waited for a signed lease prior to acquiring the property, obtaining permits and beginning construction; Ernst submitted materials and made representations to West Jordan City indicating it would lease the property; Ernst submitted a binding Offer to Lease which was consistent with the essential lease terms negotiated in June; and none of the other matters to be negotiated were by any stretch of the imagination "deal-breakers" to which Stangl would not ultimately accede to Ernst's requests. See Statement of Facts at ¶¶ 8, 9, 10, 14, 15, 18, 20, 22, 23, 25, 28, 29, 30.

D. Stangl suffered detriment as a result of his reliance on Ernst's promise and the trial court employed the proper measure of damages to ensure justice.[31]

The court found that Stangl suffered detriment "based upon his reasonable reliance upon Ernst's representations that it would enter into a lease to become the anchor tenant at the Plaza property" in the amount of $331,391. (R. 2229.) This amount constitutes Stangl's "out-of-pocket expenses incurred in the acquisition and refurbishment of the Plaza property" less rental income received from other tenants and less amounts allocable to the Plaza property upon its sale to Green Isle.[32] (R. 2228.) This finding is consistent with the evidence and is legally correct. Because damage assessment is a function of the fact finder, this Court reviews the measure of damages employed by the trial court for clear error. Andreason, 848 P.2d at 174. The trial court's damage calculation will be set aside only if "clearly erroneous with no reasonable support in the evidence." Klinger v. Kightly, 889 P.2d 1372, 1381 (Ut. App. 1995)

Promissory estoppel, like part performance, is an equitable doctrine concerning equitable rights and remedies. Id.; Tolboe Const. Co. v. Staker Paving & Const Co., 682 P.2d P.2d 843, 845

---

[31] VII.C and VII.E of Appellant's brief present arguments virtually identical to its argument set forth in Section VII.B(5). By making the same argument in three places, Ernst attempts to camouflage the true nature of its argument. In reality, Ernst challenges the factual basis of the court's damage award Stangl addresses the extent of Stangl's detriment and the measure of damages employed to compensate that detriment together under this heading.

[32] Ernst again challenges this finding of the trial court without marshalling the evidence supporting it. Accordingly, as explained above, this court must consider the trial court's finding to be accurate.

(Utah 1984). Accordingly, courts have wide discretion and may grant whatever relief is necessary to achieve complete justice. Andreasen, 175-176; Ludlow v. Colorado Animal By-Products Co., 137 P.2d 347, 353 (Utah 1943); Walters v. Marathon Oil Co., 642 F.2d 1098, 1100 (7th Cir. 1981); Gerson Electric Constr. v. Honeywell, Inc., 453 N.E.2d 726, 728 (Ill. App. 1983). See also Corbin on Contracts § 8.11, p. 57; Restatement (Second) of Contracts §§ 90, 139. In keeping with the equitable nature of promissory estoppel, courts have awarded the full range of promissory remedies, including expectation damages, specific performance, reliance damages, restitution damages, lost profits and many blended recoveries as equity dictates.[33] See, e.g., Breaux v. Schlumberger Offshore Services, 817 F.2d 1226, 1232 (5th Cir. 1987) (awarded lost future rentals on promissory estoppel claim); Chedd-Angier, 756 F.2d at 937 (awarding full contract damages); Walters, 642 F.2d at 1100-01; Westside Galvanizing Servs., Inc. v. Georgia-Pacific Corp., 921 F.2d 735 (8th Cir. 1990) (awarding a blended recovery of expectation and reliance damages); Wilk v. Vencill, 180 P.2d 351 (Cal. 1947) (specific performance); Signal Hill Aviation Co., Inc. v. Stroppe, 158 Cal. Rptr. 178 (1979) (award of both reliance damages and lost past and future profits). As one court explained, "since it is the historic purpose of equity to secure complete

---

[33] This is consistent with Restatement (Second) of Contracts § 90, which authorizes remedies limited only "as justice requires." § 90(1) & comment (d), § 139(1); Andreason, 848 P.2d at 175; Goldstick v. ICM Realty, 788 F.2d 456, 463 (7th Cir. 1986) (noting that benefit-of-the bargain damages are often appropriate for promissory estoppel); Chedd-Angier Production v. Omni Publications Int., 756 F.2d 930, 937 (1st Cir. 1985) ("whether to charge full contract damages, or something less, is a matter of discretion"); Corbin on Contracts § 8.11 at 56.

justice, the courts are able to adjust the remedies so as to grant the necessary relief. . . ." Walters, 642 F.2d at 1100. See Corbin, § 8.12, pp. 67-7.

The court here acted within its discretion, and without error, in awarding Stangl his out-of-pocket expenses. Contrary to Ernst's assertion, detrimental reliance damages are not necessarily limited to a narrow window of time between the promise and repudiation of that promise.[34] Rather, a promissory estoppel plaintiff in a failure to lease case is entitled to a reasonable time following a breach of promise to mitigate his damages and to recoup "expenses during this time, plus any loss sustained on the disposition of the building." [35] Mahoney v. Delaware McDonald's Corp., 770 F.2d 123, 128 (8th Cir. 1985).

In Mahoney, the plaintiff exercised an option to purchase a building and incurred substantial debt in reliance on a promise to lease. The defendant subsequently breached its promise, and never occupied the lease premises.[36] Looking to the Restatement (2d) § 90, the court held plaintiff had a duty to mitigate his damages and that the plaintiff was entitled to a reasonable time following the

---

[34] The Arizona failure to lease case cited by Ernst at 38-39 of its brief, viewed promissory estoppel as a substitute for consideration, rather than as an equitable principle. Trollope v. Koerner, 515 P.2d 340 (Ariz. App. 1973). In any event, that case did not evaluate promissory estoppel reliance damages. Rather, the case involved a claim of a theory of quasi-contractual recovery. Id. at 341. The measure of damages used by the Trollope court is thus inapplicable to the promissory estoppel case at hand.

35 This aspect of the case distinguishes it from the facts of Andreason, 848 P.2d 171. The Andreason plaintiffs did not incur any continuing obligations as a result of their reliance, nor were they required to mitigate their damages.

[36] In Mahoney, unlike this case, there was no indication that the building was not marketable. Id. at 128.

breach of the promise to accomplish such mitigation. The court held that plaintiff's "expenses during this time, plus any loss sustained on the disposition of the building, would constitute his just reliance damages." 770 F.2d at 128. Based on the specific facts of that case, the court reversed an award of the plaintiff's interest costs and other expenses over approximately a four-year period, but did allow plaintiff to recover those costs incurred in the five-month period after the breach during which the building remained vacant. Id.

Here, Stangl originally asked the court for damages measured by his lost profits over the 25 year lease period, costs incurred in acquiring the property, and all costs incurred in mitigation until he sold the property. (R. 2084-103.) The trial court viewed all the evidence, weighed the credibility of the witnesses, and determined that justice required that Stangl recover only his out-of-pocket expenses incurred in acquiring the Plaza property to meet Ernst's fast-track time schedule and then mitigating his damages by refurbishing the property to get Ernst in as a tenant or attract a new anchor tenant or purchaser. (Finding 46, R. 2228-29.)

The court found that Stangl incurred substantial debt to purchase the Plaza property, buy out the trust deed, and make Ernst's required improvements all in reliance on Ernst's promise to enter into a lease and become the anchor tenant.[37] Upon Ernst's

---

[37] See Finding No. 42, R. 2227; see also 3142-45, 3152-59, 3258-59, 3320-27, 3902-04 4360-61, Ex. 88A. Ernst asserts that as of September 29, 1988, the Plaza property had a positive value of at least $177,070 and Stangl had spent only $7,380.59 on improvements. Ernst fails to mention, however, that by that date, Stangl had also paid $24,571.58 in loan interest, $36,937.20 in loan origination fees and insurance (this number is reduced from the $44,341.20 (continued...)

repudiation, Stangl did not and could not simply walk away from an unmarketable, run-down property, but continued to make the improvements set in motion by Ernst's promise and made necessary by Ernst's repudiation. No evidence supports Ernst's implicit assumption that had Stangl ceased all efforts to upgrade the property as of September 29, 1988, he could have sold it at all, much less for $1.5 million. To the contrary, the evidence established that Stangl unsuccessfully tried to attract a purchaser or a new anchor tenant by contacting hardware stores, grocery store chains, movie theater operators, fabric stores, drug stores and others. (Finding No. 44, R. 2228; see also 3189-90, 3893-94, 4390-91, 4394, 4407.)

Stangl had to create a finished product in order to sell or lease the property. (R. 3259-67.) In light of the deteriorated condition of the property, the existence of two new shopping centers in the area, Stangl's significant and ongoing interest payment obligations, and Stangl's pledge of his adjacent properties and leases as security for the Plaza property loan, the Court found that Stangl acted reasonably in improving the property to attract a new anchor tenant or purchaser. As in Mahoney, Stangl is entitled to his expenses in doing so. Thus, the court concluded that "justice requires that Ernst pay Stangl his out-of-pocket

---

[37](...continued)
listed in Ex. 88A, Subpart "A: to reflect the court's deduction of $7,404 in finding 48; (c) $3,305.78 in legal fees regarding property acquisition (this number is reduced from $3,738.78 listed in Ex. 88A, Subpart "A" to reflect the court's deduction of fees in its finding 48(b)).

costs of $331,391.00." (Finding Nos. 46-48, R. 2228-29, Conclusion No. 11, R. 2232; see also 3259-69.)[38]

All said, Stangl spent over $2.2 million in purchasing and renovating the Plaza property. (Finding No. 44, R. 2228, Ex. 88A (Addendum K).) He recovered only $1,688.447.48 by the sale to Green Isle. (Ex. 88A.) Ernst knew its requirement that the site be ready for fixturing by October 1, 1988 meant that Stangl had to purchase the property and commit himself to the project before a final lease could be signed (see R. 2224, 3018-26, 3036-38, 3584; Exs. 14, 6.) Ernst started the train rolling and invited Stangl

---

[38] Ernst also challenges aspects of the damage award to Stangl. It asserts that Stangl under-reported the amount he received from Green Isle for the Plaza property, because he backed out $92,355.52 of the Green Isle purchase price for back taxes attributable to the Brockbank portion of the Plaza property. (See R. 4506, Ex. 88A, Subpart D.) (See Stangl's testimony that the closing statement erred when it indicated the taxes being paid were for any tax years prior to 1988, R. 4505 -06.) This argument is based upon Ernst's inability to properly read a closing statement. Stangl received no compensation from Green Isle for payment of back taxes. In fact, at closing, Stangl was obligated to come up with an additional $120,151, in part to pay off the back taxes. (See Ex. 48.) Thus, those taxes were additional expenses incurred by Stangl with respect to the Plaza property and were properly included in the damage calculation. Moreover, the back taxes paid at the closing of the sale to Green Isle were not the same as the back taxes Stangl was obligated to pay when he purchased the property from Brockbank.

Ernst also asserts that the damages should have been reduced by $11,700 for an allegedly uncredited vacancy rate adjustment included in Stangl's original damage exhibit but left out of Exhibit 88A. Ernst, however, ignores the portion of the record where Stangl testified that on the early version of his damages exhibit he erroneously included the vacancy rate on two parcels (the Firestone and IET properties) that were leased during the entire relevant time period. (R. 4521.) As Stangl testified, when he discovered the vacancy rate mistake, he backed the variable out of his damages calculations in order to correct the numbers and to do his best to provide an accurate damages calculation. (R. 4521.) The trial court heard Stangl's testimony and received all relevant exhibits and determined the damage award accordingly. The evidence supports the trial court's damages calculations and they may not be disturbed.

aboard. Once on board, Stangl's only option was to stay on for the ride. (R. 3259-65.) The record fully supports the trial court's holdings that Stangl's reliance on Ernst's promise resulted in his detriment in the amount of $331,391.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING CERTAIN EVIDENCE OBJECTED TO BY ERNST.

The trial court properly exercised its discretion in admitting Stangl's damage evidence. Ernst's complaints to the contrary misstate both what actually occurred below and the appropriate legal standard for this court to apply. The decision of whether or not to admit particular evidence at trial is within the trial court's discretion. Teece v. Teece, 715 P.2d 106, 108-09 (Utah 1986). "'Where the authority to perform a proposed action rests with the discretion of the court, [appellate courts] must allow considerable latitude in which he may exercise his judgment.'" Id. (quoting Carmen v. Slavens, 546 P.2d 601 (Utah 1976)). Teece held that the trial court did not abuse its discretion by failing to impose sanctions against a plaintiff who did not comply with defendant's discovery requests when the record supported its finding of justifiable delay. 715 P.2d at 109.[39] The record here

---

[39] This is not refuted by the holding of Darrington v. Wade, 812 P.2d 452 (Utah App. 1991), the inapposite case upon which Ernst relies to support its argument that Stangl should have been "punished" for his actions. Darrington involved sanctions imposed on grossly elusive and uncooperative defendants. See id. at 454-55. After entering and setting aside two default judgments, the trial court ordered defendants to pay additional costs and attorney's fees as a discovery sanction, but refused to reinstate the default judgment. Id. at 455. The appellate court found that the trial court did not abuse its discretion in failing to impose harsher sanctions. Id. Contrary to Ernst's assertion, the court did not state that violations of discovery rules should not go unpunished. It merely noted its belief that the particular circumstances of the case warranted some kind of Rule 37 discovery sanction.

conclusively shows that the trial court carefully considered all of the objections Ernst made, evaluated the evidence for possible prejudice, and rendered a well thought out decision as to the admissibility of each piece of evidence to which there as an objection. (See R. 7289-365, 4835-77, 4847-48, 4792-94, 4646-47, 4636-40, 4421-24, 4363, 4309-17, 2991-98, 2104-24, 2039-49.)

Prior to the court's decision to bifurcate the trial, Stangl introduced his Exhibit 65, showing the cash flow analysis relating to the Plaza property project and Stangl's damages theory. (R. 3190, 3196.) Ernst objected to the exhibit on the ground that it had only recently been provided to Ernst and that it did not apply the proper measure of damages under either promissory estoppel or breach of contract. (R. 3197-99.) The court heard argument on Ernst's objections, but made no determination as to admissibility at that time. (R. 3227.) When faced with Ernst's motion to bifurcate on February 17, 1993, the court heard argument, determined it was unclear that either party was at fault and bifurcated the trial to give the court an opportunity to rule as to liability and Ernst extra time to work out its problems. (R. 7289-365.) In the end, it was one full year before the trial reconvened. The court never admitted Stangl's Exhibit 65[40] and during both phases, the court reserved on Ernst's objections until all evidence was in, in order to fairly rule as to admissibility. (R. 2125, 2126, 2991-98, 3227, 4363, 4421-24, 4646-47, 4855, 4857.) The trial court obviously took Ernst's objections seriously, considered and weighed

---

[40] Ernst offered that exhibit or portions of it as defendant's Exhibit 406, which the court did admit. Surely, Ernst does not challenge the admissibility of its own exhibit. (R. 4877.)

them carefully, and ultimately determined to allow the admission of some, but not all of the offered evidence. The trial court has discretion to make such judgment calls; it is best positioned to do so. Ernst has not shown, nor can it show any evidence supporting its contention that the trial court abused its discretion in admitting the evidence complained of.[41]

Ernst unfairly frames the circumstances surrounding Stangl's revised damages calculation as a "trial-by-ambush tactic" intended to deprive Ernst of the opportunity to fairly analyze the damages aspect of the case. Rather, Stangl's damages calculation revisions stemmed from his efforts to eliminate accounting errors in order to present the most accurate damages calculation.[42] The record

---

[41] A review of the exhibits and record pages cited by Ernst to support its claim of error shows that claim to be baseless. First, Ernst only objected to the following: introduction of evidence concerning Stangl's banking relationship with Valley Bank (R. 2991-98, 4309-17, 4461-63), admission of two canceled checks evidencing Stangl's interest payments to Brockbank (R. 2039-83, 4309-17, 4410-12), the admission of several of Stangl's revised damages calculation exhibits (R. 4309-17, 4636-40, 4646-47, 4835-907), and admission of Stangl's amended tax returns (R. 4835-907). Of the evidence objected to, only two of the revised damages calculations and the two canceled checks were ultimately admitted into evidence and considered by the court (R. 4794, 4835-907, 4365). Ernst's citations also show that Stangl's methodology used to calculate his damages never changed throughout trial (Exs. 88, 88A, 404). Stangl's revised calculations ultimately resulted in a reduced claim in Ernst's favor (Ex. 88A) and Ernst was on notice of the objected to elements Stangl's damages claims throughout discovery (R. 2104-27, 4835-907, see also 4362-64, 4853). In any event, the court gave Ernst ample opportunity to show prejudice and carefully considered Ernst's objections in making its rulings as to admission. (R. 4309-18, 4316-17, 4392-94, 4835-907, 2039-83.)

[42] Stangl's out-of-pocket costs stemmed from numerous complicated financial transactions and it was necessary to review a substantial number of documents concerning those transactions to accurately calculate those costs. (R. 4419, 4309). In preparing for trial and briefing, Stangl checked and rechecked the damages calculations. During trial, Ernst pointed out additional errors, and Stangl promptly amended the total damages amount to account for (continued...)

indicates that the changes resulted not from new methodology as stated by Ernst, but rather from the discovery of errors in favor of both Stangl and Ernst and information obtained throughout the proceedings. (R. 4637, 4609, 4599-4600, 4528-29, 4309-12, Exs. 88, 88A, 404 (Addenda L, K & M).)

In any event, Ernst cannot claim prejudice from Stangl's efforts to refine his damages calculations. Stangl's promissory estoppel damage theory never changed during trial. At all stages of discovery and throughout the proceedings, Ernst was free to question the witnesses about Stangl's damages and to review any applicable documents it desired, including the back-up documents for Stangl's exhibits. (R. 2104-24, Plaintiff's Response to Objection (attached as Addendum N.) Ernst simply declined to do so, or do its own analysis of Stangl's damage claim. Ernst can show no evidence that Stangl ever withheld any documentation underlying his damage calculation. Stangl should not be punished because Ernst failed to ask questions or copy documents concerning each specific background element of Stangl's total damages claim. Indeed, ultimately the amount submitted benefitted Ernst.[43] (Ex.

42(...continued)
those errors and submitted a revised damages summary exhibit. (R. 4309-12.) Exhibit 88A presents the final revision to those calculations, Stangl also provided the court and Ernst with Exhibit 89 which explained the changes contained in 88A from Exhibit 88 and the resulting $100,749.67 reduction in Stangl's damages claim. (R. 4636, Ex. 89.) These discoveries and the resulting damage calculation revisions were conscientious efforts to ensure that the trial court and defendant were presented with the most accurate calculations available. Stangl's damages were fairly and accurately presented. (R. 4309-12.)

[43] Stangl's out-of-pocket loss calculations ranged from $534,342.53 to a final calculation of $407,308.60. (Exs. 65A-C, 88, 88A, 404).

88A.) Stangl's several damage exhibits represent his effort to amalgamate his costs into one complete and accurate document.

Nor did the trial court abuse its discretion in this case. Ernst cannot point to anything in the record which establishes that Stangl refused to comply with any court order or eluded or refused to cooperate in discovery. Instead, the record shows that Stangl made conscientious efforts to present the court with the most accurate damage analysis possible.

CONCLUSION

For all the foregoing reasons discussed above, Ernst's appeal must be denied, and the judgment of the trial court affirmed.

DATED this 17th day of June, 1996.

GIAUQUE, CROCKETT, BENDINGER & PETERSON
First Interstate Plaza
170 South Main, #400
Salt Lake City, Utah 84101

BY _____
Attorneys for Appellee

CERTIFICATE OF SERVICE

I certify that two (2) true and accurate copies of **BRIEF OF THE APPELLEE** was mailed, first class, postage pre-paid on the 17th day of June, 1996 to the following:

Roger J. Kindley
John P. Mele
RYAN, SWANSON & CLEVELAND
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034

and hand-delivered to the following:

Anne Swensen
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

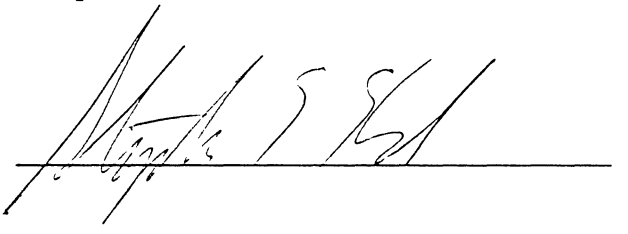


Exhibit A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

F.C. STANGL, III, an individual,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 890902771 CN
vs.	:	
ERNST HOME CENTER, INC., a Washington corporation,	:	
Defendant.	:	

This matter was tried to the court sitting without a jury. In the midst of trial the court granted defendant's alternative motion to bifurcate. As a consequence, only liability issues were tried; damage issues were severed, to be tried at a later date if necessary.

Plaintiff's claims arise out of a purported lease by plaintiff to defendant of a considerable portion of a shopping center development in Salt Lake County referred to as Jordan Valley Plaza ("Plaza"). Plaintiff's theories of recovery are breach of contract, promissory estoppel, breach of covenant of good faith and fair dealing and equitable compensation. At trial and throughout this litigation, defendant challenged the factual and legal bases for each of plaintiff's theories. One of its primary defenses was the Statute of Frauds.

Plaintiff, F.C. Stangl, III ("Stangl") had an ownership interest in the Plaza from approximately 1979 until the fall of 1981 at which time he transferred his interest to the Brockbanks. Stangl, however, remained a guarantor of Brockbanks' obligation to the lender. Ultimately the lender's interest was assigned to Aetna. In early 1987, Stangl was informed that the Brockbanks had defaulted on their loan. In September, 1987, Aetna formally notified Stangl of the Brockbanks' default. Aetna, however, never made a demand on Stangl as a guarantor of the Brockbank obligation. Because Aetna was of the belief that there was little likelihood of a deficiency, it initiated a nonjudicial foreclosure on the property.

Sometime in the first five months of 1987, defendant Ernst Home Center, Inc. ("Ernst"), a Seattle, Washington corporation, became aware of the availability of space in the Plaza formerly occupied by Gibson Discount, an anchor tenant. As a consequence, Ernst contracted for a site feasibility study which was completed in May, 1987. Ernst interpreted this study to indicate that an Ernst store at the Plaza site would be economically marginal. There is no indication that Ernst proceeded any further with the site on its own initiative.

Armed with the knowledge of Gibson's vacating the property, Brockbank's default and bankruptcy, and Aetna's foreclosure, Stangl apparently saw a development opportunity. In late May, 1988, a Mr. Steve Pruitt, acting on behalf of Stangl, generated a call to Ernst probing their interest in leasing the primary site at the Plaza. Pruitt's call was forwarded to Mr. Mack DuBose, Ernst's Vice-President in charge of real estate planning and development. DuBose indicated some level of interest and on June 3, 1988, Pruitt forwarded to DuBose materials relating to the Plaza. In this June 3 correspondence, Pruitt erroneously indicated that Aetna would be enforcing Stangl's guarantee and that Stangl would have possession of the property by the end of June. In the same correspondence, however, Pruitt suggested that Stangl would refinance the Plaza with Aetna.

Sometime between June 4 and June 23, 1988, DuBose and two other Ernst employees inspected the property with Pruitt. The day following this site visit, DuBose and Pruitt met and DuBose expressed a desire to proceed. On June 23, 1988 Pruitt sent a letter to DuBose outlining some very basic terms including the term of the lease and option periods and base and percentage rent. Pruitt specifically referenced Stangl's responsibility to provide a turnkey building and set a fixturing date of October 1, 1988.

Pruitt, however, did not address any of the following issues: whether Ernest would be obligated to continuously operate on the premises or would have the right to vacate and merely pay the base rent; whether and under what conditions Ernst could sublet or assign its interest; whether Stangl's failure to meet his continuing duties would cause an abatement in rent.

On June 29, less than a week following Pruitt's June 23 letter, Stangl paid Brockbank $1,000.00 for a one month option to purchase the Plaza. The option provided for two extensions upon the payment of additional consideration.

In late afternoon on June 29, 1988, DuBose faxed a response to Pruitt's June 23 proposal. With one exception, DuBose responded to each specific item proposed by Pruitt. DuBose specifically indicated agreement with Stangl providing a turnkey operation and absorbing parking lot resurfacing costs. DuBose also agreed with the October 1, 1988 fixturing date and proposed the commencement of rent sixty days after the premises were turned over to Ernst for fixturing. The one item to which DuBose did not respond was entitled "Occupancy Expenses" which included a Pruitt proposal for a triple net lease with Ernst paying all occupancy costs including insurance. DuBose made no reference to issues involving continuous use, subletting and assignment or abatement. DuBose then proceeded

to indicate that an agreement could be reached. He stated that the next step would be to complete a "binding Offer to Lease" and the final step was to draft the actual lease which would take three to five weeks.

DuBose's testimony indicates his belief that no legal consequences flow from a "binding Offer to Lease." His testimony further indicates that the items in a "binding Offer to Lease" were matters which were settled and would ultimately be contained in the final lease agreement. While the court credits DuBose's testimony and belief in this regard, he never communicated to Pruitt or Stangl his perceived limitations on the "binding Offer to Lease."

On July 8, 1988, Stangl applied to the West Jordan City Planning Commission for a conditional use permit, a site plan review and permission to locate a sign. The application indicates that it was for an Ernst store and a hearing date was set for July 20, 1988. On July 12 DuBose wrote to the City Manager of West Jordan indicating Ernst's intent to consummate a lease at the Plaza.

On July 8, 1988 DuBose authored a letter to Stangl and Pruitt. Stangl did not receive the letter until the afternoon of July 12. In this letter DuBose specified the "terms acceptable to [Ernst] relative to the Leasing [sic] of space in the. . . Plaza." He further stated that "[t]he lease contemplated by this proposal

shall be based on the. . . terms and conditions" specified in the letter. While not expressly so described, the proposal in the July 8 letter was a proposed "binding Offer to Lease" as DuBose had previously used that phrase.

Sometime between Stangl's receipt of the July 8 letter and July 14, 1988, Stangl and DuBose had a telephone conversation. Stangl claims that during this telephone conversation he and DuBose reached an agreement on all significant points and that he expressed the agreement in a letter to DuBose dated July 14, 1988. DuBose acknowledges that he spoke with Stangl or Pruitt in this time period but denies that they reached any oral agreement. There is insufficient credible evidence to establish the claimed oral agreement preceding the Stangl letter of July 14. Consequently, Stangl's July 14 letter at that time constituted a mere counteroffer to DuBose's July 8 letter.

On July 15, 1988, DuBose authored a letter to Stangl which Stangl claims constitutes a signed acceptance of the proposal in Stangl's letter of July 14. There is insufficient credible evidence to establish that the July 15 letter is an acceptance or a verification of an acceptance of the proposal in Stangl's July 14 letter. Instead, the July 15 letter anticipated an "Offer to Lease" which was yet to be "completed" and forwarded a form lease

for discussion of additional items which would have to be resolved. It does appear, however, that DuBose did not have any strong objections to the proposal contained in Stangl's July 14 letter. DuBose forwarded that letter or an adaptation thereof for approval as an "Offer to Lease" to Ernst's President. In this referral, DuBose indicated that construction "must begin by 8/15/88."

Although there was some indication that Ernst had internally placed the project on hold during the latter part of July, Ernst did not inform Stangl that the project was in jeopardy or would be delayed. All outward appearances were that the project would proceed. Throughout the month of July, 1988, Ernst's architects, Dykeman, referred written materials and communicated with Stangl's employees regarding construction. On July 18, DuBose through his secretary referred Ernst's financials to Pruitt requesting discrete treatment of the financials. On July 20, Ernst's Director of Construction, Rob King, attended a meeting of the West Jordan Planning and Zoning Commission.

Finally, on August 2, 1988 DuBose generated two telephone calls to Pruitt indicating that the project had been approved and that a letter of intent would be forthcoming. Pruitt testified he interpreted this to mean the letter of intent would be the Stangl letter of July 14, the last written communication on terms and conditions. At least as of the phone conversations between Stangl

and DuBose just preceding Stangl's letter of July 14, however, Stangl effectively conducted the negotiations on his own behalf and Pruitt was on the periphery. The evidence does not support a finding that in the August 2 phone conversations DuBose led anyone to believe that the July 14 letter, or for that matter the July 8 letter, would be the operative document. A reasonable inference is that DuBose did not have reference to either but merely indicated the project would proceed. DuBose then apparently set about editing the July 14 letter as a means of preparing the promised letter of intent or Offer to Lease. (See Exhibit 22).

On August 5, 1988 Stangl sent to DuBose the Ernst form lease with substantial changes apparently proposed by Stangl's counsel. As a consequence, DuBose determined not to forward an Offer to Lease and did not further communicate with Stangl until August 23, 1988.

Since sometime in June, the parties treated the project as an expedited one with delivery of the premises to Ernst for fixturing on October 1, 1988. DuBose acknowledged that approximately 60 days were needed to complete construction prior to delivery for fixturing. DuBose's hesitation between August 5 and August 23 did not retard the speed with which other aspects of the project proceeded. The Ernst architects continued to refer written construction materials to Stangl. On or about August 17, Stangl

sought bids on the asphalt work. While it appears that Stangl committed to acquire the Aetna Trust Deed and note owing by Brockbank on July 14, he did not close with the Brockbanks until August 9. In light of the August 2 calls from DuBose to Pruitt and all that had proceeded before that time, this was a reasonable step in furtherance of what DuBose signaled, i.e., that Ernst would be the anchor tenant at the Plaza. While DuBose could not have anticipated this precise step, he could have and should have reasonably anticipated that Stangl would make legal and economic commitments in furtherance of the project to accommodate an October 1 possession date. DuBose himself testified that normally the question of risk bearing for pre-lease expenditures is addressed during negotiations. That was not the case here.

Following the August 2 phone calls, it was approximately three weeks before DuBose next communicated with Stangl. On August 23, 1988 he sent to Stangl a copy of a lease which he indicated Ernst was prepared to sign. In his testimony, DuBose admitted that this commitment was not entirely correct for Ernst was not yet convinced the project was economically feasible. DuBose further testified that before Ernst would commit to the project a feasibility analysis would have to be completed. Ernst did not explain this to Stangl.

Stangl responded with proposed changes on August 29, 1988. Stangl did not anticipate that any of his proposed changes would be sufficiently problematic to jeopardize the project. Based on previous communications and dealings with DuBose, this conclusion was entirely and reasonably justified.

DuBose responded on September 12, 1988 with a letter specifically addressing each of Stangl's proposed changes of August 29. DuBose stated that several issues were unresolved and there was a risk negotiations would terminate absent resolution of the significant issues. DuBose then scheduled or confirmed a meeting with Stangl in Salt Lake on September 14. This was the first indication from Ernst that the project was in jeopardy.

Just before his trip to Salt Lake, DuBose tendered his resignation to Ernst. DuBose and Ellis Kantor, both representing Ernst, met with Stangl in Salt Lake on September 14. Contrary to the testimony of DuBose and Kantor, they did not inform Stangl that DuBose was leaving Ernst. At the meeting there were five primary issues to be resolved: abatement of rent; subletting; responsibility of providing and paying for insurance; percentage rent in the option period; and, whether Ernst could cease operations or be required to continuously operate. These open issues had not previously risen to the level of significance that

they acquired for the September 14 meeting. For example, these issues were not even mentioned in the July 8 letter from DuBose.

At the September 14 meeting Stangl indicated his preference on the open issues but stated that, if Ernst insisted, each of the issues would be resolved in accordance with Ernst's preference. Based on the meeting, Stangl reasonably expected to receive from Ernst an acceptable lease by September 23. The day following the meeting was DuBose's last day with Ernst. On or about that same day, Thomas Stanton, Ernst's Senior Vice-President of Operations, told Kantor the project was on hold. On September 23, Stangl generated a call to Ernst inquiring about the lease. He was then informed that DuBose was no longer employed. Both Kantor and Stanton further informed Stangl that DuBose's projects were on hold. Stanton also alluded to a market study. This was the first indication Stangl had of such a study or the need for such a study. In a letter of September 29, Stanton formally notified Stangl that Ernst would not be a tenant in the Plaza.

In accordance with the above factual determinations, Ernst and Stangl did not enter into a contract whether written or oral. There was no acceptance by Ernst of the counteroffer specified in Stangl's July 14 letter. While Ernst's July 15 letter anticipated that an "Offer to Lease" would be completed, the parties did not complete an offer to lease.

Beginning with its June 29 letter, however, Ernst set the negotiations on a course such that any reasonable lessor should reasonably expect Ernst to be bound by a mutually acceptable "Offer to Lease" containing the significant business points. Even though Ernst's form of an "Offer to Lease" expressly contemplated a subsequent, written lease, its language and conduct indicated that the subsequent lease would resolve only the less significant matters not addressed in the "Offer to Lease." Furthermore, it was reasonable to conclude that any items not raised in Ernst's June 29 or July 8 letters were not significant. Ernst should have reasonably anticipated that Stangl would draw these same conclusions.

It was not unreasonable for Stangl to believe that the project would proceed following DuBose's phone calls of August 2. Those phone calls suggest at that time DuBose attributed no particular significance to the differences between his letter of July 8 and Stangl's letter of July 14.

With DuBose's promises and representations of August 2 in hand, it was reasonable for Stangl to make commitments, incur obligations and proceed with the project in order to deliver

possession as close to October 1 as possible. DuBose should have expected Stangl to undertake such actions following his oral commitments of August 2 and before a formal lease was executed.

In addressing the issue of reliance and part performance, the parties at trial focused on mid-July as the beginning point of Stangl's financial commitments. This Memorandum Decision, however, resolves that August 2 should be the beginning point for analysis of commitments. It is significant that important steps in Stangl's acquisition of the Plaza occurred both before and after the August 2 promises. For these reasons the court has now chosen to defer ruling on precisely which of Stangl's actions were induced by the August 2 promises.

Having resolved that no contract was formed, this court need not address the bulk of the issues arising out of the Statute of Frauds.[1] The court previously resolved that the doctrine of promissory estoppel may be invoked to bar the application of the Statute of Frauds. Medesco Inc. v. LNS International, Inc., 762 F. Supp. 920 (D. Utah 1991). In this case promissory estoppel either subsumes or is the substantial equivalent of equitable

---

[1]It is appropriate, however, merely to note that upon further consideration, the court now acknowledges the first paragraph of its February 10, 1993 Minute Entry is an erroneous application of Utah Code Ann., Section 25-5-4(1).

compensation, the only other of plaintiff's theories not dependent on a contract. Consequently, the remaining issues to be addressed when the trial resumes include the following: (1) the actions taken or completed by Stangl after August 2; (2) whether such actions were induced by Ernst; and, (3) the appropriate remedy.

The court assumes that this Memorandum Decision constitutes compliance with Rule 52, Utah Rules of Civil Procedure. The party prevailing on any issue, however, is free to submit further proposed findings consistent with this Memorandum Decision which he or it deem necessary. Counsel should further feel free to schedule a telephone or other conference with the court to discuss the nature and timing of further proceedings.

Dated this 20th day of April, 1993.

MICHAEL R. MURPHY
DISTRICT COURT JUDGE

STATE OF UTAH
3RD DISTRICT COURT
SALT LAKE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 20 day of April, 1993:

Stephen G. Crockett
Stephen T. Hard
Attorneys for Plaintiff
136 S. Main, Suite 500
Salt Lake City, Utah 84101

David A. Greenwood
Patrick J. O'Hara
Attorneys for Defendant
50 S. Main, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145

Roger J. Kindley
Attorney for Defendant
1201 Third Avenue, Suite 340
Seattle, Washington 98101-3034

Exhibit B

Stephen G. Crockett, Esq. (0766)
Stephen T. Hard, Esq. (1359)
Steven E. McCowin, Esq. (4621)
GIAUQUE, CROCKETT,
BENDINGER & PETERSON
170 S. Main, Suite 400
Salt Lake City, UT 84101
Telephone: (801) 533-8383

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

FRANZ C. STANGL, III, an individual, dba F.C. STANGL CONSTRUCTION COMPANY, Plaintiff, vs. ERNST HOME CENTER, INC., a Washington corporation, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 89-090-2771-CN (Hon. Michael Murphy)

This suit was brought by F.C. Stangl, III ("Stangl") who alleged that defendant Ernst Home Centers, Inc. ("Ernst") had breached an agreement to enter into a five-year lease at the Jordan Valley Plaza or alternatively that he had detrimentally relied upon representations and conduct of Ernst and that he was entitled to recover damages based upon a theory of promissory estoppel. Liability issues were tried before the Court, without

jury from approximately February 11, 1993 to February 19, 1993. In its Memorandum Decision, dated April 20, 1994, the Court ruled that there was insufficient evidence to establish a contract, but that Ernst may be liable to Stangl under the theory of promissory estoppel. The Memorandum Decision is attached to these Findings of Facts and Conclusions of Law as Exhibit "A" and are incorporated herein by reference. The remaining issues were tried before the Court from February 22, 1994 to February 24, 1994.

At all phases of the trials, plaintiff F.C. Stangl, III. was represented by Stephen G. Crockett and Stephen T. Hard. Defendant Ernst Home Centers, Inc. was represented by Roger J. Kindley. Ernst was also represented by David A. Greenwood and Patrick J. O'Hara during the first phase and by Elizabeth Dolan Winter during the second phase.

Having examined the admissible evidence presented at both phases of trial and having heard the arguments of counsel, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff F.C. Stangl, III ("Stangl") has been in the business of real estate development and construction for many years.

2. Defendant Ernst Home Centers, Inc. ("Ernst") is a Washington corporation in the business of retail sales of home-improvement materials, tools, plant nursery items, and other consumer products and services.

3. This lawsuit concerns the Jordan Valley Plaza ("Plaza") located at 9000 South Redwood Road, West Valley City, Utah.

4. From sometime in 1979 through the fall of 1981, Stangl had an ownership interest in the Plaza at which time his interest in the Plaza was transferred to the Brockbanks with the exception of two small contiguous parcels of land which Stangl retained to develop. The Brockbanks assumed the indebtedness secured by the Plaza. Stangl remained a guarantor of Brockbanks' obligation to the lender. The lender's interest was subsequently assigned to Aetna.

5. In September 1987, Aetna formally notified Stangl that the Brockbanks had defaulted on the loan secured by the Plaza. Aetna, however, never made a demand for payment on Stangl as a guarantor of the Brockbanks' obligation.

6. Both Aetna and Stangl believed that the value of the Plaza would exceed the value of the amounts due on the loan, i.e. that there would be no deficiency for which Stangl would be liable. Accordingly, Aetna initiated a nonjudicial foreclosure

of the property. The Brockbanks then filed for relief under Chapter 11 of the Bankruptcy Code.

7. In the first five months of 1987, Ernst had become aware of the availability of space in the Plaza which had formerly been occupied by Gibson Discount, an anchor tenant. As a consequence, Ernst caused a site feasibility study to be completed in May, 1987. At that time, Ernst interpreted this study to indicate that an Ernst store at the site would be economically marginal.

8. Given the Brockbanks' default and bankruptcy, and Aetna's anticipated foreclosure of the Plaza, Stangl saw a business opportunity with respect to the property. In late May, 1988, Mr. Steve Pruitt, acting on behalf of Stangl, generated a call to Ernst to determine whether it had any interest in leasing the anchor space at the Plaza.

9. Pruitt's call was forwarded to Mr. Mack DuBose, Ernst's Vice-President in charge of real estate planning and development. DuBose indicated that Ernst had some interest in the property as a site for an Ernst store.

10. On June 3, 1988, Pruitt forwarded to DuBose documents relating to the Plaza. In his June 3, 1988 letter, Pruitt erroneously indicated that Aetna would be enforcing Stangl's guarantee and that Stangl would have possession of the property by the end of June. In the same correspondence,

however, Pruitt also suggested that Stangl would refinance the Plaza with Aetna.

11. Between June 4 and June 23, 1988, DuBose and two other Ernst employees met with Pruitt and inspected the anchor space in particular and the Plaza generally. The day following the site visit, DuBose and Pruitt met. During this meeting, DuBose expressed a desire to proceed further with negotiations whereby Ernst would lease the anchor tenant site at the Plaza.

12. On June 23, 1988, Pruitt sent a letter to DuBose outlining some very basic terms of a proposed lease including the initial period of the lease, option periods, base rent and percentage rent. Pruitt's letter specifically referenced requests by Ernst that Stangl be able to provide a turnkey building to Ernst which would be ready for installment of fixtures by October 1, 1988.

13. There were a number of matters that were not addressed in Pruitt's June 23, 1988 letter, including: whether Ernst would be obligated to continuously operate on the premises or would it have the right to vacate and merely pay the base rent; whether and under what conditions Ernst could sublet or assign its interest; and whether Stangl's failure to meet his continuing duties would cause an abatement of rent.

14. On June 29, 1988, Stangl took steps to obtain the right but not the obligation to acquire the Plaza if Ernst

expressed further interest in entering into a lease. On that date, Stangl executed an Option agreement with the Brockbanks and paid the Brockbanks $1,000.00. The Option had an exercise price of $1,150,000. The Option also required the Brockbanks to: (1) require the Bankruptcy Court to release the property; (2) cure all defects in title to the property; and (3) convey the property by warranty deed.

15. Also on June 29, 1988, Stangl instructed his counsel to offer to purchase Aetna's interest in the trust deed on the Brockbank property. Stangl's initial offer to purchase Aetna's interest in the trust deed was rejected. On July 1, 1988, Stangl offered to purchase Aetna's interest in the trust deed for $900,000.00. The offer was subject to title to the property satisfactory to Stangl and bankruptcy court approval. This offer was accepted by Aetna on July 14, 1988.

16. Stangl had no need or desire to acquire the Plaza property unless Ernst would lease the anchor space. If Stangl had wanted to acquire the property for his own account or for speculative purposes, he would have waited to acquire the Plaza at the foreclosure of the trust deed. The reason that Stangl acquired an option to purchase the Plaza from the Brockbanks and simultaneously made an offer to purchase the trust deed from Aetna was to facilitate the speedy acquisition of the property to

enable Stangl to meet Ernst's intended fixturing date of October 1, 1988.

17. In late afternoon on June 29, 1988, DuBose faxed a response to Pruitt's June 23 letter. With one exception, DuBose responded to each specific item proposed by Pruitt. DuBose specifically agreed that Stangl should provide a turnkey operation with the October 1, 1988 fixturing date. DuBose also indicated that Stangl should absorb parking lot resurfacing costs and proposed the commencement of rent sixty days after the premises were turned over to Ernst for fixturing. The one item to which DuBose did not respond was entitled "Occupancy Expenses" which included a Pruitt proposal for a triple net lease with Ernst paying all occupancy costs including insurance. DuBose made no reference to issues involving continuous use, subletting and assignment or abatement.

18. DuBose indicated that an agreement could be reached with Stangl regarding the terms of the lease. He stated that the next step would be to complete a "binding Offer to Lease" and the final step was to draft the actual lease which would take three to five weeks.

19. Although at trial DuBose testified that he believed there were no legal consequences which would flow from a "binding Offer to Lease" and that items in such a document would ultimately be contained in the final lease agreement, DuBose

never communicated to Pruitt or to Stangl his perceived limitations on the "binding Offer to Lease."

20. On July 12, 1988, Stangl received a letter from DuBose dated July 8, 1988 wherein DuBose specified the "terms acceptable to [Ernst] relative to the Leasing [sic] of space in the Plaza." He further stated that "[t]he lease contemplated by this proposal shall be based on the . . . terms and conditions" specified in the letter. While not expressly so described, the proposal in the July 8 letter was a proposed "binding Offer to Lease" as DuBose had previously used that phrase.

21. Shortly after Stangl's receipt of the July 8 letter, Stangl and DuBose had a telephone conversation. Stangl claims that during the conversation he and DuBose reached agreement on all significant lease points and that he expressed that agreement in a letter to DuBose dated July 14, 1988. There is insufficient credible evidence to establish the claimed oral agreement preceding the July 14 letter. Consequently, Stangl's July 14 letter at that time constituted a mere counteroffer to DuBose's July 8 letter.

22. On July 15, 1988, DuBose authored a letter to Stangl which Stangl claims constitutes a signed acceptance of the proposal in Stangl's letter of July 14. There is insufficient credible evidence to establish that the July 15 letter is an acceptance or a verification of an acceptance of the proposal in

Stangl's July 14 letter. Instead, the July 15 letter anticipated an "Offer to Lease" which was yet to be "completed." That letter contained a form lease for discussion of additional items which would have to be resolved. DuBose, however, did not have any strong objections to the proposal contained in Stangl's July 14 letter. DuBose forwarded that letter or an adaptation thereof for approval as an "Offer to Lease" to Ernst's President. In the submission to Ernst's president, DuBose indicated that construction "must begin by 8/15/88."

23. On or about July 16, 1988, Stangl took steps to obtain financing from Valley Bank and Trust for the acquisition of the Plaza, for construction of improvements requested by Ernst, and for development of other portions of the Plaza. Among other things, Stangl sought approximately $1.1 million to acquire the Plaza; $655,000 to remodel the anchor site for Ernst; and $131,000 to remodel other shop space at the Plaza. He also proposed rolling into the new loan package two loans previously approved by Valley Bank for development of the two properties adjacent to the Plaza which Stangl owned. To improve the overall security for the loan package, Stangl's two adjacent properties, both of which had tenants committed for leases on buildings which Stangl would build, would also act as collateral for the other Plaza-related indebtedness. Stangl's loan request was approved by Valley Bank on or about July 19, 1988.

24. The loan agreement with Valley Bank was closed on July 28, 1988. No funds were disbursed at that time, and the Loan Agreement did not provide for disbursement of funds until Stangl acquired title to the Plaza.

25. Although there was some indication that Ernst had internally placed the project on hold during the latter part of July, Ernst did not inform Stangl that the project was in jeopardy or would be delayed. All outward appearances were that the project would proceed. Throughout the month of July, 1988, Ernst's architects (Dykeman and Associates) referred written materials and communicated with Stangl's employees regarding construction. On July 8, 1988, Stangl had applied to the West Jordan City Planning Commission for a conditional use permit, a site plan review and permission to locate a sign. The application indicated that it was for an Ernst store and a hearing date was set for July 20, 1988. On July 12, 1988, DuBose wrote to the City Manager of West Jordan indicating Ernst's intent to consummate a lease at the Plaza. On July 18, DuBose, through his secretary, referred Ernst's financial statements to Pruitt requesting discrete treatment of the financials. On July 20, Ernst's Director of Construction, Rob King, attended a meeting of the West Jordan Planning and Zoning Commission to explain Ernst's intentions with respect to the Plaza.

26. On August 2, 1988, DuBose generated two telephone calls to Pruitt indicating that the project had been approved by Ernst's management and that a letter of intent would be forthcoming.

27. The evidence does not support a finding that in the August 2 phone conversations DuBose led anyone to believe that the July 14 letter, or for that matter the July 8 letter, would be the operative document. A reasonable inference is that DuBose did not have reference to either but merely indicated that the project would proceed. DuBose then apparently set about editing the July 14 letter as a means of preparing the promised letter of intent or Offer to Lease.

28. On August 5, 1988 Stangl sent to DuBose the Ernst form lease with substantial changes apparently proposed by Stangl's counsel. As a consequence, DuBose determined not to forward an Offer to Lease and did not further communicate with Stangl until August 23, 1988.

29. On August 9, 1988, Stangl closed on the purchase of the Plaza property from the Brockbanks. In light of the August 2 calls from DuBose to Pruitt and all that had proceeded before that time, this was a reasonable step in furtherance of what DuBose had signaled and represented, i.e., that Ernst would be the anchor tenant at the Plaza. While DuBose could not have anticipated this precise step, he could have and should have

reasonably anticipated that Stangl would make legal and economic commitments in furtherance of the project to accommodate an October 1 possession date. DuBose himself testified that normally the question of risk bearing for pre-lease expenditures is addressed during negotiations. That was not the case here.

30. In order to close on the purchase of the Plaza, Stangl waived certain conditions contained in the Option agreement and the offer to purchase the trust deed from Aetna. More specifically, the Brockbanks had several tax liens on the property and thus could not deliver satisfactory title or a warranty deed to Stangl. Based on the assurances from Ernst that a lease would be entered into, Stangl agreed to pay additional amounts to pay off the tax liens. Had Stangl known that Ernst would not lease the anchor space at the Plaza, he could have declined to purchase the Plaza property and the Aetna trust deed, and he could have aborted the financing package obtained from Valley Bank.

31. As indicated above, since sometime in June, the parties treated the project as an expedited one with delivery of the premises to Ernst for fixturing on October 1, 1988. DuBose acknowledged that approximately sixty days were needed to complete construction prior to delivery for fixturing.

32. Following the August 2 phone calls, it was approximately three weeks before DuBose next communicated with

Stangl. On August 23, 1988 he sent to Stangl a copy of a lease which he indicated Ernst was prepared to sign. In his testimony, DuBose admitted that this commitment was not entirely correct for Ernst was not yet convinced the project was economically feasible. DuBose further testified that before Ernst would commit to the project, a feasibility analysis would have to be completed. Ernst did not ever explain this to Stangl. Had Stangl known that Ernst's leasing of the anchor space was contingent upon an economic feasibility study, he would not have acquired the Plaza.

33. DuBose's hesitation between August 5 and August 23 in finalizing lease terms did not retard the speed with which other aspects of the project proceeded. The Ernst architects continued to refer written construction materials to Stangl. On or about August 17, Stangl sought bids on the asphalt work in accordance with specifications received from Ernst on August 12, 1988.

34. On August 29, 1988, Stangl responded to DuBose's August 23 letter with proposed changes. Stangl did not anticipate that any of his proposed changes would be sufficiently problematic to jeopardize the project. Based on previous communications and dealings with DuBose, this conclusion was entirely and reasonably justified.

35. DuBose responded on September 12, 1988, with a letter specifically addressing each of Stangl's proposed changes of August 29. DuBose stated that several issues were unresolved and there was a risk negotiations would terminate absent resolution of the significant issues. DuBose then scheduled or confirmed a meeting with Stangl in Salt Lake City on September 14. This was the first indication from Ernst that the project was in jeopardy.

36. Just before his trip to Salt Lake City, DuBose tendered his resignation to Ernst. Nevertheless, DuBose and Ellis Kantor, both representing Ernst, met with Stangl in Salt Lake City on September 14. Contrary to the testimony of DuBose and Kantor, they did not inform Stangl that DuBose was leaving Ernst.

37. At this September 14 meeting there were five primary matters to be resolved: abatement of rent; subletting; responsibility of providing and paying for insurance; percentage rent in the option period; and, whether Ernst could cease operations or be required to continuously operate. These open issues had not previously risen to the level of significance that they acquired for the September 14 meeting.

38. At the September 14 meeting Stangl indicated his preference on these five issues but stated that, if Ernst insisted, each of the issues would be resolved in accordance with

Ernst's preference. Based on the meeting, Stangl reasonably expected to receive from Ernst an acceptable lease by September 23.

39. The day following the Salt Lake City meeting was DuBose's last day with Ernst. On or about that same day, Thomas Stanton, Ernst's Senior Vice-President of Operations, told Kantor the Jordan Valley Plaza project was on hold.

40. On September 23, Stangl generated a call to Ernst inquiring about the lease. He was then informed that DuBose was no longer employed by Ernst. Both Kantor and Stanton further informed Stangl that DuBose's projects were on hold. Stanton also alluded to an economic study. This was the first indication Stangl had of Ernst's need for such a study before leasing the anchor space at the Plaza.

41. In a letter dated September 29, 1988, Stanton formally notified Stangl that Ernst would not be a tenant in the Plaza.

42. Upon receipt of that letter, Stangl found himself in a position whereby he had purchased the Plaza, taken out substantial loans to purchase that property, had pledged his properties and leases adjacent to the Plaza, and had begun construction consistent with Ernst's stated desires.

43. At that point, Stangl could have chosen to stop further activity with respect to the refurbishment of the Plaza,

or he could continue to improve the Plaza in the hopes that Ernst would become a tenant, that it would be attractive to another anchor tenant or that it would interest a potential purchaser. Stangl, with Valley Bank's agreement, continued to renovate the Plaza. This was a reasonable course of action because, among other things, the Brockbanks had been unable to sell the property for several years given its deteriorating condition, there were two new shopping centers established in the near vicinity with which the Plaza had to compete for new tenants, and Stangl had pledged his other properties and leases as security for the loan to acquire the Plaza.

44. Stangl spent over $2.2 million in purchasing and renovating the Plaza. Stangl engaged in substantial and reasonable efforts to find a new anchor tenant or to find a purchaser for the Plaza.

45. On March 8, 1991, Stangl was finally able to sell the Plaza and the two adjacent properties which he owned (upon which a Firestone store and emissions inspection store were built and leased) to Green Isle Development Corp.

46. The Court determines that Stangl is entitled to recover his out-of-pocket expenses incurred in the acquisition and refurbishment of the Plaza less rental income he received from other tenants and less amounts allocable to the Plaza when it and Stangl's two other properties (upon which a Jiffy Lube

store and a Firestone store had been built and leased) were sold to Green Isle.

47. Except for certain adjustments described below, Plaintiff's Exhibit 88A, fairly and appropriately sets forth Stangl's damages.

48. Stangl's damages, based upon his reasonable reliance upon Ernst's representations that it would enter into a lease to become the anchor tenant at the Plaza, are $331,391.00. That amount is determined from plaintiff's Exhibit 88A showing damages of $407,309, less the following deductions:

(a) $27,851 for escrow adjustments which were counted twice in the calculation of damages;

(b) $433 in legal fees which were incurred prior to reliance upon Ernst's representations;

(c) $7,404 in loan origination fees which were incurred prior to August 2, 1988;

(d) $40,230 which represents selling costs for properties other than the Plaza.

CONCLUSIONS OF LAW

1. Ernst and Stangl did not enter into a contract whether written or oral. There was no acceptance by Ernst of the counteroffer specified in Stangl's July 14 letter. While Ernst's July 15 letter anticipated that an "Offer to Lease" would be completed, the parties did not complete an offer to lease.

2. Beginning with its June 29 letter, Ernst set the negotiations on a course such that any reasonable lessor should reasonably expect Ernst to be bound by a mutually acceptable "Offer to Lease" containing the significant business points. Even though Ernst's form of an "Offer to Lease" expressly contemplated a subsequent, written lease, Ernst's language and conduct indicated that the subsequent lease would resolve only the less significant matters not addressed in the "Offer to Lease." Furthermore, it was reasonable to conclude that any items not raised in Ernst's June 29 or July 8 letters were not significant. Ernst should have reasonably anticipated that Stangl would draw these same conclusions. There is no reason to believe that Stangl and Ernst would not have reached agreement on all lease points.

3. It was not unreasonable for Stangl to believe that the project would proceed following DuBose's phone calls of August 2. Those phone calls suggest at that time DuBose attributed no particular significance to the differences between his letter of July 8 and Stangl's letter of July 14.

4. Ernst through its words and conduct represented to Stangl that it would enter into an agreement with Stangl to lease the anchor space at the Plaza with remodeling to be done and possession to be taken on a "fast track" basis.

5. With DuBose's promises and representations through August 2 in hand, it was reasonable for Stangl to make commitments, incur obligations and proceed with the project by acquiring and renovating the property in order to deliver possession as close to October 1 as possible. DuBose should have expected Stangl to undertake such actions following his oral commitments of August 2 and before a formal lease was executed.

6. Stangl reasonably relied upon such representations to his detriment, and took definite and substantial actions in reliance upon those representations. Most significantly, he acquired the Plaza which he had no reason to do, he incurred over $1.1 million in debt which he otherwise would not have incurred, and he pledged other assets to secure that note which he otherwise would not have encumbered.

7. Stangl had no obligation to purchase the Plaza property from the Brockbanks, acquire the trust deed from Aetna, or have the July 19, 1988 loan package funded by Valley Bank, prior to date of the actual closing of the purchase of the property on August 9, 1988.

8. Ernst should have reasonably expected that its representations would induce Stangl to take dramatic action or forbearance in order to meet the "fast track" possession date.

9. After learning that Ernst did not intend to enter into a lease, Stangl reasonably and in good faith expended funds

to complete renovation of the property in order to entice Ernst to lease the property, attract a new anchor tenant, or find a new purchaser of the property.

10. Injustice can only be avoided in this case by enforcing Ernst's promise to lease the anchor space under promissory estoppel.

11. Under the theory of promissory estoppel, this Court has authority to do "what justice requires" and award damages ranging from out-of-pocket costs to full contract damages. This Court determines that justice does not require that Stangl receive contract damages, i.e. the minimum amount to which Ernst had agreed to pay as rent for the term of the lease. This Court determines that justice requires that Ernst pay Stangl his out-of-pocket costs of $331,391.00.

12. Stangl is the prevailing party in this action and is awarded his costs.

8916902771

DATED this 27th day of December, 1994.

Honorable Michael Murphy
District Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

APPROVED AS TO FORM:

GIAUQUE, CROCKETT,
BENDINGER & PETERSON

BY _____
Attorneys for Plaintiff

VAN COTT, BAGLEY,
CORNWALL & McCARTHY

BY Elizabeth Dolan Winter
Attorneys for Defendant

CERTIFICATE OF SERVICE

On the 27th day of December, 1994, a true and correct copy of the proposed FINDINGS OF FACT AND CONCLUSIONS OF LAW was hand-delivered to the following:

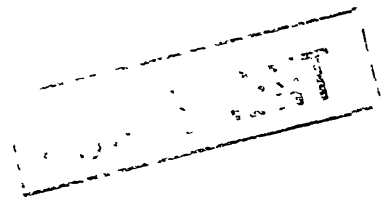
Elizabeth D. Winter
VAN COTT, BAGLEY, CORNWALL & McCARTHY
50 South Main Street
Salt Lake City, UT 84144

and mailed, first-class, postage prepaid to the following:

Roger J. Kindley
RYAN, SWANSON & CLEVELAND
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034

Kris Herrod

Exhibit C



Stephen G. Crockett, Esq. (0766)
Stephen T. Hard, Esq. (1359)
Steven R. McCowin, Esq. (4621)
GIAUQUE, CROCKETT
BENDINGER & PETERSON
170 S. Main, Suite 400
Salt Lake City, UT 84101
Telephone: (801) 533-8383

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

F. C. STANGL, III, an individual, dba F. C. STANGL CONSTRUCTION COMPANY, Plaintiff, vs. ERNST HOME CENTER, INC., a Washington corporation, Defendant.	JUDGMENT Civil No. 89-090-2771-CN Honorable Michael Murphy 21977166 12-30-94-808am

This suit was brought by F.C. Stangl, III ("Stangl") who alleged that defendant Ernst Home Centers, Inc. ("Ernst") had breached an agreement to enter into a five-year lease at the Jordan Valley Plaza or alternatively that he had detrimentally relied upon representations and conduct of Ernst and that he was entitled to recover damages based upon a theory of promissory estoppel. Liability issues were tried before the Court, without jury from approximately February 11, 1993 to February 19, 1993. In its Memorandum Decision, dated April 20,

1994, the Court ruled that there was insufficient evidence to establish a contract, but that Ernst may be liable to Stangl under the theory of promissory estoppel. The Memorandum Decision is attached to the Findings of Facts and Conclusions of Law as Exhibit "A" and are incorporated therein by reference. The remaining issues were tried before the Court from February 22, 1994 to February 24, 1994.

At all phases of the trials, plaintiff F.C. Stangl, III. was represented by Stephen G. Crockett and Stephen T. Hard. Defendant Ernst Home Centers, Inc. was represented by Roger J. Kindley. Ernst was also represented by David A. Greenwood and Patrick J. O'Hara during the first phase and by Elizabeth Dolan Winter during the second phase. Having entered its findings of fact and conclusions of law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

Judgment is entered in favor of Stangl ~~and against~~ Ernst in the amount of $331,391.00.

12/27/94

Honorable Michael Murphy
District Judge

APPROVED AS TO FORM:

Elizabeth Dolan Winter

CERTIFICATE OF SERVICE

On the ____ day of December, 1994, a true and correct copy of the proposed JUDGMENT was mailed, first-class, postage prepaid to the following:

Elizabeth Dolan Winter
VAN COTT, BAGLEY, CORNWALL & McCARTHY
50 South Main Street
Salt Lake City, Utah 84144

Roger J. Kindley
RYAN, SWANSON & CLEVELAND
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034

Stephen T. Hard, Esq.
GIAUQUE, CROCKETT, BENDINGER & PETERSON
170 S. Main, Suite 400
Salt Lake City, Utah 84101

Exhibit D

This is a legally binding form if not understood seek competent advice

OPTION

KNOW ALL MEN BY THESE PRESENTS

That JORDAN VALLEY ASSOCIATES and/or ROGER R BROCKBANK of Salt Lake City UT hereinafter referred to as Seller hereby agrees for and in consideration of ONE THOUSAND AND NO/100---------- ($ 1,000 00) Dollars, paid by F C Stangl III, a real estate broker buying for his own account of Salt Lake City, UT hereinafter referred to as Buyer as follows

1 PROPERTY Seller hereby gives and grants to Buyer and to his heirs and assigns for a period of ~~9~~ 7 months from the date hereof hereinafter referred to as First Option Period the exclusive right and privilege of purchasing the following described real property located at 1755 W 90th S (SW Corner Redwood Rd/90th S.) County of Salt Lake State of Utah and more particularly described as follows

318,507 square feet of land (approximately 7 3 acres)
and 62,800 square feet of buildings.
The Jordan Valley Shopping Center in West Jordan, Utah.

Together with all water rights appurtenant thereto or used in connection therewith (Said real property and improvements if any shall hereinafter be referred to as The Property)

2 PRICE The total purchase price for said property is ($ 1,150,000 00 ~~Dollars~~) Dollars payable in lawful money of the United States strictly within the following times to-wit. All sums paid for this option and any extension thereof as herein provided shall be first applied on the purchase price and the balance shall be paid as follows calculated by adding the existng debt +$50,000.00 Cash +Note $~~300,000.00~~ 250,000 (1.) Buyer will assume and extinguish the first mortgage and accrued interest and give Seller an unsecured (2.) Note for $250,000.00 payable as follows Ten year term at 8% interest payable at $~~1,933.33~~/month with a balloon principal payment of $~~300,000~~ 00 all due at the end of the 10th year This Note will be personally guaranteed by F C. Stangl III. (3.) $50,000 00 cash, payable - $1,000.00 option fee and additional $49,000.00 payable on closing

3 EXTENSION OF OPTION Upon payment by Buyer to Seller of an additional sum of TWENTY FOUR THOUSAND AND NO/100---------- ($ 24,000 00) Dollars, cash or by cashier's check prior to the expiration of the first option period this option shall be extended for ~~9~~ 7 months, hereinafter referred to as Second Option Period" Upon Buyer's payment to Seller of a further sum of TWENTY FIVE THOUSAND AND NO/100---------- (25,000 00) Dollars, prior to the expiration of the second option period this option shall be extended for a third period of ~~6~~ 4 additional months, hereinafter referred to as Third Option Period"

4 EXERCISE OF OPTION This option shall be exercised by written notice to Seller on or before the expiration of the first option period or if extended the expiration of the second or third option periods as the case may be Notice to exercise this option or to extend the option for a second or third option period whether personally delivered or mailed to Seller at his address as indicated after Seller's signature hereto by registered or certified mail postage prepaid, and postmarked on or before such date of expiration shall be timely and shall be deemed actual notice to Seller Seller shall require the Bankruptcy Court to release this property and terminate the bankruptcy proceedings to facilitate the final closing of this sale.

5 EVIDENCE OF TITLE

(a) Promptly after the execution of this option Seller shall deliver to Buyer for examination such abstracts of title, title policies and other evidences of title as the Seller may have In the event this option is not exercised by Buyer, all such evidences of title shall be immediately returned without expense to Seller

(b) In the event this option is exercised as herein provided Seller agrees to pay all abstracting expense or at Seller's option to furnish a policy of title insurance in the name of the Buyer

(c) If an examination of the title should reveal defects in the title Buyer shall notify Seller in writing thereof, and Seller agrees to forthwith take all reasonable action to clear the title If the Seller does not clear title within a reasonable time Buyer may do so at Seller's expense Seller agrees to make final conveyance by Warranty Deed or as directed in the event of sale of other than real property If either party fails to perform the provisions of this agreement the party at fault agrees to pay all costs of enforcing this agreement, or any right arising out of the breach thereof including a reasonable Attorney's fee

6. CLOSING ADJUSTMENTS. All risk of loss and destruction of property and expenses of insurance shall be borne by Seller until date of possession. At time of closing of sale, property taxes, rents, insurance, interest and other expenses of property shall be prorated as of date of possession. All other taxes, including documentary taxes, and all assessments, mortgage liens and other liens, encumbrances or charges against the property of any nature, shall be paid by Seller except as set forth in Paragraph 2 of this option.

7. POSSESSION. Seller agrees to surrender possession of the property on or before ..... days following written notice of the exercising of this option by Buyer.

8. The Seller recognizes F.C. Stangl ..... Real Estate Company (Broker and Agent) through its salesman None ..... as the Real Estate Broker with whom Seller listed this property for sale, and Seller agrees to pay a commission to said Broker of 0 $ of the gross sale price. Seller hereby authorizes the agent to withhold such commission from the proceeds of sale at time of closing.

9. If this option be not exercised on or before the dates specified herein for exercise of same, the option shall expire of its own force and effect and the Seller may retain such option monies as have been paid to the Seller as full consideration for the granting of this option.

IN WITNESS WHEREOF, the Seller hereunto has set his name this 29th day of June 19 88.

SIGNED IN PRESENCE OF:

6/29/88

Seller

Address of Seller: .....

S0010020

Exhibit E

LAW OFFICES OF
KIMBALL, PARR, CROCKETT & WADDOUPS
A PROFESSIONAL CORPORATION
SUITE 1200
185 SOUTH STATE STREET
POST OFFICE BOX 11019
SALT LAKE CITY, UTAH 84147
TELEPHONE (801) 532-7840
TELECOPIER (801) 532-7750

June 29, 1988

VIA TELECOPIER

Aetna Life Insurance Company
c/o Steven E. Tyler, Esq.
Callister, Duncan & Nebeker
Suite 800
Kennecott Building
Salt Lake City, Utah 84133

Re: Brockbank Loan

Gentlemen:

As you know, we represent F. C. Stangl III. It is our understanding that Aetna Life Insurance Company, a Connecticut corporation ("Aetna"), is the sole holder of the beneficial interest under that certain Deed of Trust, dated September 3, 1981, executed by Bruce R. Brockbank and Jeanne D. Brockbank, husband and wife, and Roger R. Brockbank and Leda A. Brockbank, husband and wife, collectively as trustors, in favor of Utah Title and Abstract Company, a Utah corporation, as trustee, and Western Mortgage Loan Corporation, a Utah corporation ("Western Mortgage"), as beneficiary, and recorded on September 4, 1981 as Entry No. 3601828 in Book 5289 at Page 254 of the official records. (Said Deed of Trust was assigned to Aetna pursuant to a certain Assignment of Security Instruments, dated July 22, 1987, executed by Western Mortgage, as assignor, in favor of Aetna, as assignee, and recorded on July 23, 1987 as Entry No. 4496632 in Book 5944 at Page 1680 of the official records.)

This letter constitutes an offer from Mr. Stangl to purchase said beneficial interest for the sum of Seven Hundred Thousand and 00/100 Dollars ($700,000.00) cash, payable within ten (10) days after this offer is accepted, subject to confirmation of title satisfactory to Mr. Stangl, and to receipt of bankruptcy court approval, if necessary.

This offer will remain open until 12:00 noon, Mountain Daylight Time, July 1, 1988, on which date the same will expire unless accepted. We look forward to your response.

Sincerely,

KIMBALL, PARR, CROCKETT & WADDOUPS

Victor A. Taylor

cc: F. C. Stangl III

Exhibit F

F. C. STANGL CONSTRUCTION CO.

4455 SOUTH 700 EAST • SUITE 300 • SALT LAKE CITY, UTAH 84107-3082 • PHONE (801) 262-0381
SPECIALISTS IN COMMERCIAL AND INDUSTRIAL PLANNING AND DEVELOPMENT

July 1, 1988
AIRBORNE EXPRESS
(ALSO SENT FAX)

Mr. Larry Konefal
c/o AETNA REALTY INVESTORS, INC.
City Place
Hartford, CT 06156

Re: Brockbank Loan

Dear Mr. Konefal:

It is my understanding that Aetna Life Insurance Company, a Connecticut Corporation ("Aetna") is the sole holder of the beneficial interest under that certain Deed of Trust, dated September 3, 1981, executed by Bruce R. Brockbank and Jeanne D. Brockbank, husband and wife, and Roger R. Brockbank and Leda A. Brockbank, husband and wife, collectively as trustors, in favor of Utah Title and Abstract Company, a Utah Corporation, as trustee, and Western Mortgage Loan Corporation, a Utah Corporation ("Western Mortgage"), as beneficiary, and recorded on September 4, 1981 as Entry No.3601828 in Book 5289 at Page 254 of the official records. (Said Deed of Trust was assigned to Aetna pursuant to a certain Assignment of Security Investments, dated July 22, 1987, executed by Western Mortgage, as assignor, in favor of Aetna, as assignee, and recorded on July 23, 1987 as Entry No. 4496632 in Book 5944 at Page 1680 of the official records.)

This letter constitutes my (F.C. Stangl III's) offer to purchase said beneficial interest for the sum of $900,000.00 (NINE HUNDRED THOUSAND AND NO/100) cash, payable within ten (10) days after this offer is accepted, subject to confirmation of title satisfactory to me, and to receipt of Bankrupty Court approval, if necessary.

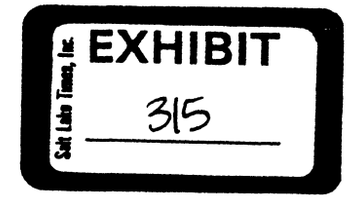
This offer will remain open until 12:00 noon, Mountain Daylight Time, July 12, 1988, on which date the offer will expire unless accepted. I look forward to your response.

ok if extended to → 14th 26th

Sincerely,

F.C. Stangl III

FCS:cj
cc: Victor A. Taylor, Attorney
Steven Tyler, Attorney
Chad Mullins (Western Mortgage)



S0015577

Exhibit G

HEBB & GITLIN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
ONE STATE STREET
HARTFORD, CONNECTICUT 06103-3178
TELEPHONE
(203) 548-0000
TELECOPIER (203) 278-6998
TELEX: 752-966

July 14, 1988

VIA FEDERAL EXPRESS

Mr. F. C. Stangl, III
F. C. Stangl Construction Co.
Suite 300
4455 South 700 East
Salt Lake City, Utah 84107-3092

Re: Roger R. Brockbank (the "Debtor")
Chapter 11 Case No. 88B-00747

Dear Mr. Stangl:

Larry Konefal has asked that I follow up his recent conversation with you regarding your offer, as set forth in your letter to him dated July 1, 1988, to purchase (the "Sale") the beneficial interest of Aetna Life Insurance Company ("Aetna") in a certain Deed of Trust (the "Deed of Trust") under which Aetna holds an interest in property which is part of the estate of the Debtor.

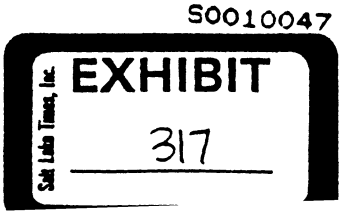
1. This letter constitutes Aetna's acceptance of your offer to purchase the Deed of Trust for the sum of $900,000.00 cash, payable within 10 days following the within acceptance of your offer.

2. Aetna will be prepared to deliver the Deed of Trust and related instruments to you on July 25, 1988 following verification of receipt of funds on or before July 25, 1988 in the amount of $900,000.00.

3. Aetna will prepare the necessary instrument for assignment of the Deed of Trust.

4. Aetna will provide at its earliest convenience further instructions regarding the account to which funds should be transferred.

S0010047



5. Future correspondence concerning arrangements for closing of the Sale should be directed to Steven E. Tyler, Esq., Callister, Duncan & Nebeker, Kennecott Building, Suite 800, Salt Lake City, Utah 84133, 9801) 530-7300.

Very truly yours,

H. Talmage Day, Jr.

HTD/rp
cc: Marilda G. Alfonso, Esq.
Lawrence J. Konefal
Steven E. Tyler, Esq. (via telecopier)

Exhibit H

LAW OFFICES OF
KIMBALL, PARR, CROCKETT & WADDOUPS
A PROFESSIONAL CORPORATION
SUITE 1300
185 SOUTH STATE STREET
POST OFFICE BOX 11019
SALT LAKE CITY, UTAH 84147
TELEPHONE (801) 532-7840
TELECOPIER (801) 532-7750

DALE A. KIMBALL
CLAYTON J. PARR
STEPHEN G. CROCKETT
CLARK WADDOUPS
ROBERT A. JOHNSON
RICHARD G. BROWN
DAVID E. GEE
JAMES E. CANNON
SCOTT M. LOVELESS
PATRICIA W. CHRISTENSEN
DAVID K. REDD
ROBERT G. HOLT
JAMES C. SWINDLER
ROBERT S. LOCHHEAD
STEPHEN J. HULL
GARY A. DODGE
ROBERT S. CLARK
THOMAS S. GREEN
RICHARD G. CLAYTON
LAYNE M. CAMPBELL
MICHAEL M. LATER
CAROLYN B. MCHUGH
VICTOR A. TAYLOR
RONALD G. RUSSELL
ROGER G. HENRIKSEN
HARR C. WILKEY
R. GLEN WOODS
MATTHEW B. DURRANT
GREGORY D. PHILLIPS
JOHN R. ERICKSON
JILL A. NIEDERHAUSER
KENNETH C. JOHNSEN
JAN N. HENRIE
BRIAN J. ROMRELL
GERALD L. EDGAR
DAVID G. ANGERBAUER
HEIDI E.C. LEITHEAD
JOHN M. BURKE
STEVEN R. PARRY

OF COUNSEL
CHARLES L. MAAR
BRUCE A. MAAR

July 28, 1988

HAND DELIVERED

Roger R. Brockbank
1701 East 4620 South
Salt Lake City, Utah 84117

Re: Exercise of Option

Dear Roger:

As you know, we represent F. C. Stangl III. Mr. Stangl, through his attorneys, hereby exercises his option under the Option, dated June 29, 1988, entered into between you and Mr. Stangl. The closing of the purchase and sale of the subject property shall take place as soon as the property can be transferred to Mr. Stangl free and clear of all liens. Because of the failure to give notice to Wall Investment Company of the hearing yesterday, its liens would continue to attach to the subject property as things now stand. Therefore, we will request Bill Thurman, your attorney, to re-notice the hearing so that the sale of the subject property will be absolutely free and clear of all liens.

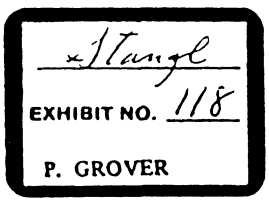
If you have any questions with respect to this letter or if we can be of any further assistance, please feel free to contact the undersigned or Mr. Stangl.

Sincerely,

KIMBALL, PARR, CROCKETT & WADDOUPS

Victor A. Taylor

cc: F. C. Stangl III
William Thomas Thurman, Esq.



S0015006

Exhibit I

LANDMARK TITLE COMPANY

BUYERS SETTLEMENT STATEMENT

ROGER R. BROCKBANK — Sellers

F. C. STANGL, III — Buyers

Property Address JORDAN VALLEY PLAZA — Order Number 1607

	CHARGES	CREDITS
Sales Price	1,200,000 00	XXXXX
Earnest Money Deposit paid to Option Money to Brockbank	XXXXX	1,000 00
Expenses		XXXXX
Title Insurance Premiums Lenders billed to Valley		XXXXX
Recording Fees All billed to Valley		XXXXX
Escrow Closing Fee	150 00	XXXXX
		XXXXX
		XXXXX
		XXXXX
		XXXXX
Prorations: As of No prorations 19		
Taxes for 19 No prorations days @		
Fire Insurance days @		
Amt. $ Exp. Prem. $		
Delinquent taxes	25,053 97	
Delinquent taxes	42,826 25	
Delinquent taxes	4,320 93	
	XXXXX	
Existing Indebtedness With		
Princ. $ As of	XXXXX	
Interest From To		
Reserve Account Balance As of		
Assumption Fee		
Promissory Note		250,000.00
Escrowed funds		23,453.86
	1,272,351.15	274,453.86
Sub-Totals	XXXXX	997,897.29
Balance due from Buyers		
Totals	1,272,351.15	1,272,351.15

Date: August 9, 1988

Approved:

F. C. STANGL, III — Buyers

PAYMENT SCHEDULE

Principal & Interest $_____

Taxes & Insurance $_____

TOTAL

First Payment Due _____, 19___

Loan No. _____

Mailing Address

Prepared by:

LANDMARK TITLE CO.

By Michelle Thurston

F Stangl
EXHIBIT NO. 134
P GROVER

S0015677

PLAINTIFF'S EXHIBIT 66A
C-890902777-CV

LANDMARK TITLE COMPANY

SELLERS SETTLEMENT STATEMENT

ROGER R. BROCKBANK — Sellers

T.C. STANGL, III — Buyers

Property Address: Jordan Valley Plaza — Order Number: 1607

	CHARGES	CREDITS
Sales Price	XXXXX	1,200,000 00
Earnest Money Deposit Option Money	1,000 00	XXXXX
Expenses:		XXXXX
Title Insurance Premiums Owners Policy 60%	1,803 00	XXXXX
est.Recording Fees Quit-Claim. Satisfaction. Subst.. release. etc.	60 00	XXXXX
Escrow Closing Fee	150 00	XXXXX
Escrowed funds on Sign Works lien 1½ times	6,645 20	XXXXX
Escrow set up fee	100 00	XXXXX
Recording of lien release	8 00	XXXXX
		XXXXX
		XXXXX
Prorations: As of No prorations 19		
Taxes for 19 days @		
Fire Insurance days @ No prorations		
Amt. $ Exp. Prem. $		
Other:		
Sales Commission to		XXXXX
Existing Indebtedness With Aetna Life Insurance Co.		
Princ. $ As Of	900,000 00	XXXXX
Interest		
Reserve Account		
Escrowed funds for taxes transfered to Stangl	23,453 86	
Reconveyance fee and substitution fee		
Promissory Note	250,000 00	
Sub-Totals	1,183,220 06	1,200,000 00
Balance Due to Sellers	16,779 94	XXXXX
Totals	1,200,000 00	1,200,000 00

Date: August 9, 1988

Approved:

ROGER R. BROCKBANK

Sellers

Seller's Mailing Address

Prepared by:

By Michelle

S0015678

Exhibit J

DEPOSITION EXHIBIT 199

S Page 1 - REG

OMB No 2502-0265

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

B. TYPE OF LOAN: 1. ☐ FHA 2. ☐ FMHA 3. ☒ CONV. UNINS 4. ☐ VA 5. ☐ CONV. INS.

6. FILE NUMBER: 90033095 | 7. LOAN NUMBER | 8. MORTG. INS. CASE NO

SETTLEMENT STATEMENT

NOTE. This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

C. NAME AND ADDRESS OF BORROWER	E. NAME AND ADDRESS OF SELLER	F. NAME AND ADDRESS OF LENDER
REEN ISLE DEVELOPMENT COM	F. C. STANGL III	VALLEY BANK AND TRUST COMPANY

PROPERTY LOCATION	H. SETTLEMENT AGENT	I. SETTLEMENT DATE:
›t 011 Block 327 3S 1W 27-03-327-011 ec 2703 '00 WEST 9000 SOUTH JST JORDAN, UTAH 84088	BACKMAN-STEWART TITLE SERV. 7070 UNION PARK; MIDVALE,UT. 84047 PLACE OF SETTLEMENT BACKMAN-STEWART TITLE SERV. 7070 UNION PARK; MIDVALE,UT. 84047	03/08/91

J. SUMMARY OF BORROWER'S TRANSACTION		K. SUMMARY OF SELLER'S TRANSACTION	
GROSS AMOUNT DUE FROM BORROWER		400 GROSS AMOUNT DUE TO SELLER	
1 Contract sales price	2,350,000.00	401 Contract sales price	2,350,000.00
Personal property		402 Personal property	
Settlement charges to borrow (line 1400)	3,212.00	403.	
		404	
		405	
,ustments for items paid by seller in advance.		Adjustments for items paid by seller in advance	
City/town taxes to		406 City/town taxes to	
County taxes to		407 County taxes to	
Assessments to		408. Assessments to	
		409.	
		410.	
		411	
		412.	
GROSS AMOUNT DUE FROM BORROWER	2,353,212.00	420. GROSS AMOUNT DUE TO SELLER:	2,350,000.00
AMOUNTS PAID BY OR IN BEHALF OF BORROWER.		500. REDUCTIONS IN AMOUNT DUE TO SELLER:	
Deposit or earnest money	5,000.00	501 Excess deposit (see instructions)	
Principal amount of new loan(s)	1,810,000.00	502. Settlement charges to seller (line 1400)	143,708.00
Existing loan(s) taken subject to		503 Existing loan(s) taken subject to	
CREDIT COMMISION (POC)	140,000.00	504. Payoff of first mortgage loan	2,210,000.00
		505 Payoff of second mortgage loan	
		506. PAYOFF 86-90 TAX SALES	42,301.65
		507 PAYOFF 1990 TAX SALES	42,322.74
RENT PRORATA 3-8 TO 3-31	14,637.20	508. RENT PRORATA 3-8 TO 3-3	14,637.20
TRANSFER-SECURITY DEPOSIT	9,450.30	509 TRANSFER-SECURITY DEPOSI	9,450.30
stments for items unpaid by seller		Adjustments for items unpaid by seller	
City/town taxes to		510. City/town taxes to	
County taxes 01/01/91 to 03/08/91	7,731.13	511. County taxes 01/01/91 to 03/08/91	7,731.13
Assessments to		512. Assessments to	
		513.	
		514.	
		515.	
		516.	
		517	
		518.	PT00000878
		519.	
TOTAL PAID BY/FOR BORROWER.	1,986,818.63	520. TOTAL REDUCTION AMOUNT DUE SELLER:	2,470,151.02
CASH AT SETTLEMENT FROM/TO BORROWER:		600. CASH AT SETTLEMENT TO/FROM SELLER.	
Gross amount due from borrower (line 120)	2,353,212.00	601 Gross amount due to seller (line 420)	2,350,000.00
Less amounts paid by/for borrower (line 220)	1,986,818.63	602. Less total reductions in amount due seller (line 520)	2,470,151.02
CASH ☒ FROM) ☐ TO) BORROWER:	366,393.37	603. CASH ☐ TO) ☐ FROM) SELLER.	120,151.02

HUD-1
RESPA, HB 4305.2

PLAINTIFF'S EXHIBIT 48
C-890902771-CN

Exhibit K

EXHIBIT 65-- SUMMARY OF RELIANCE DAMAGES

All costs incurred in acquiring and developing all the properties sold to Green Isle 3/91--Ex. 88, subpart "A"	$2,900,402.38
Less those costs associated with acquisition and development of the Firestone and Ind. Test'g properties -- Ex. 65, subpart "B"	($682,585.23)
Equals costs incurred in acquiring and developing the Brockbank property in reliance on Ernst leasing	$2,217,817.16
Less credit for rental income received on North Shops and from Jiffy Lube-- Ex. 65, subpart "C"	($122,061.08)
Less credit for amount received from sale of Brockbank portion Brockbank portion of the property to Green Isle-Ex 65,subpart "D"	($1,688,447.48)
TOTAL OUT-OF-POCKET DAMAGES SUFFERED BY STANGL IN RELIANCE ON ERNST LEASING	$407,308.60

In addition, Mr. Stangl will testify about the loss of the banking relationship.

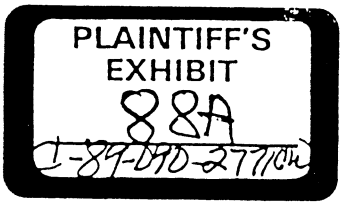


EXHIBIT 65--- SUBPART "A"
Jordan Valley Plaza
Detailed Costs and Expenditures through 3/8/91

	Description of Costs	
1	Acquisition of Brockbank Property- Ex. 66A	$1,272,351.15
1a	Credit for Aetna escrow funds- Ex. 66A	($23,453.86)
1b	Interest payments on Note to Brockbank (9/88 to 1/91)-Ex. 66C	48,333.43
2	VB&T Loan Origination Fee- Ex. 66B	37,020.00
3	VB & T Title Insurance-Ex. 66B	5,054.00
4	VB & T Legal Fees- Ex.66B	2,167.20
5	VB & T Inspection Fees- Ex. 66B	500.00
6	VB & T Rigby Appraisal Fees- Ex. 66B	4,500.00
7	VB & T Interest through 3/8/91- Ex. 66B	309,977.80
8	Property Taxes- 1988- Ex. 66	34,132.50
9	Value of Firestone Land-Ex. 65, Subpart G	193,828.94
10	Value of Ind,Testing Land-Ex.65, Subpart G	129,518.49
11	Selling Cost for sale to Green Isle- Ex. 48	143,708.00
12	Payment to VB & T at time of sale to Gr. Is.- Ex. 48	120,151.02
13	Tenant expense reimb. Michow/Larsen- Ex. 66	3,084.66
14	Deleted. Included in line item no. 24	0.00
15	Dillman Electric- Ex. 66	950.00
16	Kimball, Parr legal fees- Ex. 66D	3,770.03
17	Firestone expenditures-- Ex. 66	251,451.06
18	Independent Testing expenditures--Ex. 66	86,750.03
19	Jiffy Lube expenditures-- Ex 66	190,152.49
20	On-site expenditures- Ex. 66	127,489.33
21	American Publishing expenditures--Ex. 66	10,740.15
22	American Printing expenditures--Ex. 66	3,971.41
23	Weight Watchers expenditures- Ex. 66	7,640.61
24	North Shops expenditures-Ex. 66	146,458.78
25	Jordan Valley lease repair exp.--Ex. 66	1,335.73
26	Youth Care expenditures- Ex. 66	1,187.06
27	Payments made to reduce principal after default--Ex. 66B	27,963.43
28	Less Loan Reduction Amount--Ex.66B	(240,331.06)
	TOTAL ACQUISITION COSTS AND EXPENDITURES	$2,900,402.38

EXHIBIT 65, SUBPART "A" JORDAN VALLEY PLAZA- DETAILED COSTS
BEFORE AND AFTER 9/30/88

		Before 9/30/88	After 9/30/88	Totals	
1	Acquisition of the Property	$1,272,351.15		$1,272,351.15	
1a	Credit for Aetna escrow funds	($23,453.86)		($23,453.86)	
1b	Interest Paid on Brockbank Note	1,666.67	$46,666.76	$48,333.43	
2	VB&T Loan Orignation Fee	37,020.00		$37,020.00	
3	VB&T Title Insurance	5,054.00		$5,054.00	
4	VB&T Legal Fees	2,167.20		$2,167.20	
5	VB&T Inspection Fees	100.00	400.00	$500.00	
6	VB&T Appraisal fee		4,500.00	$4,500.00	(11/17/1988)
7	VB&T Interest through 3/8/91	22,904.91	287,072.89	$309,977.80	
8	1988 Property Taxes		34,132.50	$34,132.50	(11/8/88)
9	Firestone Land	193,828.94		$193,828.94	
10	Emission Testing/Fastech Land	129,518.49		$129,518.49	
11	Selling Costs (GreenIsle Sale)		143,708.00	$143,708.00	(3/8/1991)
12	VB&T to close (GreenIsle Sale)		120,151.02	$120,151.02	(3/8/1991)
13	Tenant Improvement Reimbursement			$0.00	
	Minchow/Larsen		3,084.66	$3,084.66	(3/6/1991)
14	Deleted, $375 included in item #24		0.00	$0.00	(2/1/1990)
15	Dillman Electric		950.00	$950.00	(10/19/1989)
16	Kimball, Parr Legal Fees			$0.00	
	(regarding acquisition)	3,738.78	31.25	$3,770.03	
17	Firestone (hard costs 1/27/88			$0.00	
	through 11/3/88	251,451.06		$251,451.06	
18	Emission Testing (hard costs)		86,750.03	$86,750.03	(11/22/88-12/10/89)
19	Jiffy Lube (hard costs		190,152.49	$190,152.49	(12/31/88-8/8/89)
20	On-Site Improvements (hard costs)	7,380.59	120,108.74	$127,489.33	
21	American Publishing (hard costs)		10,740.15	$10,740.15	(3/16/90-11/9/90)
22	American Printing (hard costs)		3,971.41	$3,971.41	(4/18/90-8/30/90)
23	Weight Watchers (hard costs)		7,640.61	$7,640.61	(3/18/90-6/8/90)
24	North Shops (hard costs)		146,458.78	$146,458.78	(3/12/89-7/31/89)
25	Jordan Valley Lease Repair (hard costs)		1,335.73	$1,335.73	(3/26/89-8/18/89)
26	Youth Care (hard costs)		1,187.06	$1,187.06	(11/25/90-12/27/90)
27	Principal Reduction Payments		27,963.43	$27,963.43	(6/18/90-9/18/90)
28	Less Loan Reduction Amount		(240,331.06)	($240,331.06)	(2/28/91)
				$0.00	
	TOTAL	$1,903,727.93	$996,674.45	$2,900,402.38	

EXHIBIT 65A-- ANALYSIS OF PAYMENTS RECORDED FOR ON-SITE IMPROVEMENTS

CATEGORY	POSTED BY 9/30/88	POSTED BY 12/30/88	POSTED BY 4/4/89	POSTED AFTER 4/5/89	CUMULATIVE TOTAL
020 - PLANS	$1,971.57	$133.00		$124.50	2,229.07
030 - BLDG PERMITS	90.00				90.00
040 - INSURANCE		554.00	831.00	8,175.00	9,560.00
070 - LEGAL FEES	3.00				3.00
090 - DEMOLITION	2,807.90	374.57			3,182.47
100 - LAYOUT		320.42			320.42
110 - EXCAVATION		42,666.72	357.00		43,023.72
120 - FOUNDATIONS		89.48			89.48
170 - STRUCTURAL FRAME		84.57			84.57
260 - HEATING & AIR				950.00	950.00
270 - ELECTRICIAL		2,653.00			2,653.00
280 - FIRE SYSTEM			1,497.00		1,497.00
390 - FINISH CARPENTRY	231.93	121.22			353.15
400 - SPECIALTY ITEMS	359.97	201.96	13.02		574.95
500 - SITE DRAINAGE	70.72	964.93			1,035.65
510 - CURB & GUTTER		11,248.17			11,248.17
520 - ASPHALT		31,079.00			31,079.00
530 - FENCING	57.60	14.40			72.00
580 - FLOOR COVERINGS	479.33				479.33
660 - LANDSCAPING		5,690.18	570.00	5,801.43	12,061.61
690 - FINISH CLEANUP		39.06			39.06
740 - CONTINGENCIES	436.00	998.74	1,662.00		3,096.74
760 - SUPERVISION	445.59	1,327.24			1,772.83
999 - PAYROLL BURDEN	426.98	1,563.17	3.96		1,994.11
TOTALS	$7,380.59	$100,123.83	$4,933.98	$15,050.93	127,489.33

EXHIBIT 65—— SUBPART "B"
Costs Associated with Acquisition and Development of
Firestone and Independent Testing Properties

Firestone Land (See Ex 65, subpart "G")	$193,828 94
Independent Testing Land (See Ex 65, subpart "G")	$129,518 49
Firestone Construction Costs and Expenditures-Ex 66	$251,451 06
Independent Testing Costs and Expenditures- Ex 66	$86,750 03
Interest Paid on these costs-Ex 65, Subpart "E"	$70,222 35
Less Allocated Share of Loan Reduction- Ex 65, sub "F"	($49,185 65)
	$682 585 23

EXHIBIT 65-- SUBPART "C"
Total net income received on Jordan Valley Plaza, not including depreciation

Firestone Rent:	$115,710.00
Firestone CAM	$10,066.46
Independent Testing Rent	$47,284.82
Independent Testing CAM	$4,168.31
Total Firestone & Ind. Test'g Rent & CAM	$177,229.59
Total Net Rental Income from Jordan Valley Plaza-- Ex. 65C, p.2	$198,541.00
Less Net Firestone and Ind. Test'g Rent & CAM	($177,229.59)
Plus addition of net interest on "Jack Green" loan	$5,240.95
Plus addition of interest taken as expense, but which is included in Brockbank and Valley Bank interest amounts in subpart "A"	$81,567.64
Plus addition of legal fees from Kimball, Parr included in subpart "A" and legal fees incurred for Firestone related matters	$13,941.08
TOTAL NET RENTAL INCOME PERTAINING TO REST OF JORDAN VALLEY PLAZA (I.E. THE BROCKBANK PROPERTY	$122,061.08

Calculation of Total Net Rental Income for Ex 65, Subpart "C"

Exhibit 65C -- rents received (actually rent, CAM, & misc income)		
	1988	$33,275 00
	1989	$160,098 00
	1990	$195,082 00
	1991	$42,546 00
	Total	$431,001 00
Exhibit 65C- expenses (including depreciation listed 1988, 1991)		
	1988	($38,588 00)
	1989	($117 603 00)
	1990	($70,643 00)
	1991	($50 768 00)
	Total ex	($277,602 00)
Exhibit 65C identifies Jordan Valley Net Rental Income		
	1988	($5,313 00)
	1989	$42,495 00
	1990	$124,439 00
	1991	($8,222 00)
	Total Net Rental Income for Jordan Valley	$153,399 00
Total net rental income, w/o depr'n 1988-$13,521, 1991-$31,621 total depreciation listed in tax returns= $45,142		$45,142 00
TOTAL NET RENTAL INCOME, NOT INCLUDING DEPREC'N		$198,541 00

EXHIBIT 65– SUBPART "D"
Analysis of Amount Received for Property
at Time of Sale to Green Isle, Using Income
Valuation Method

Annual Firestone Building Rent	$47,880 00
Annual Independent Testing Building Rent	$23,254 68
TOTAL RENT	$71,134 68
Less 7% (management, repairs,etc.)	($4,979 43)
NET INCOME	$66,155 25
Valuation of Firestone & Ind Test'g Using 10% Capitalization Rate	$661,552 52
Total Sales Price for all the Properties sold to Green Isle	$2,350,000 00
Less Valuation of Firestone & Ind Test'g	($661,552 52)
Value of Properties Acquired from Brockbank in anticipation of Ernst leasing the property at the time those properties sold to Green Is	$1,688,447 48

EXHIBIT 65- SUBPART "E"
Firestone & Ind Testing Interest Calculations
Based on B Exs 668 ,19C

	INTEREST RATE	DESCRIPTION	CRAFT CODE(19C)	INT. AMOUNT	IND. T'G DISB'T AMT	FIREST DISB'T AMT	TOTAL
8/26/88		CK00027549	OOOO65			$389,896 40	$389,896 40
11/4/88	11 50%	Interest Calculation		$8,599 08			$398,495 48
11/4/88		CK00029122	OOOO42		$4,150 00		$402,645 48
11/4/88		CK00029122	OOOO42		8,407 00		$411,052 48
11/4/88		CK00029122	OOOO65			11,098 16	$422 150 64
11/28/88	11 50%	Interest Calculation		3,192 15			$425 342 79
12/8/88	12 00%	Interest Calculation		1,398 39			$426,741 18
12/8/88		CK00029766	OOOO42		6,624 90		$433,366 08
1/19/89	12 00%	Interest Calculation		5,984 01			$439,350 09
1/19/89		CK00031082	OOOO42		23,353 20		$462,703 29
2/10/89	12 00%	Interest Calculation		3,346 68			$466 049 97
2/14/89	12 50%	Interest Calculation		638 42			$466 688 39
2/14/89		CK00031082	OOOO42		25,828 16		$492,516 55
2/24/89	12 50%	Interest Calculation		1,686 70			$494 203 25
3/14/89	13 00%	Interest Calculation		3,168 32			$497,371 57
3/14/89		CK00031555	OOOO42		2,835 80		$500,207 37
5/16/89	13 00%	Interest Calculation		11,223 83			$511,431 20
5/16/89		CK00032683	OOOO65			18 285 00	$529 716 20
6/1/89	13 00%	Interest Calculation		3,018 66			$532,734 86
6/1/89		CK000321819	OOOO65			11,000 94	$543,735 80
6/5/89	13 00%	Interest Calculation		774 64			$544,510 44
7/11/89	12 50%	Interest Calculation		6,713 14			$551,223 58
11/1/89	12 00%	Interest Calculation		20,478 33			$571,701 91
				$70,222 35	$71,199 06	$430,280 50	$571,701 91

From Ex 19C
OOOO42 refers to "Phase VI"
OOOO65 refers to "Phase VIII"

Ex 311 identifies Phase VI as const'n of North Pad building loan, which was Firestone
Phase VIII as pmt for existing (Ind Test'g)

EXHIBIT 65– SUBPART "F"
Allocation of Loan Reduction

Ind. Test'g Disbursements– Ex. 65, subpart "E"	$71,199.06
Firestone Disbursements– Ex. 65, subpart "E"	$430,280.50
Total Disbursements Ind. Test'g and Firestone	$501,479.56
Total Loan Balance Before Reduction as shown on Ex. 66B	$2,450,331.06
Ratio of Ind. Test'g/Firestone to Total	20%
Loan Reduction Amount– Ex. 66B	$240,331.06
Ind. Test'g/Firestone portion of reduction	$49,185.65

EXHIBIT 65– SUBPART "G"
Calculation of land
values for Firestone & IET

FIRESTONE

Gross Annual Rent	$47,880.00
less 7%(repairs, reserves,etc.)	($3,352.00)
Net Rent	$44,528.00
10% Capitilization Rate	$445,280.00
Less Construction Costs (Ex. 66)	($251,451.06)
VALUE OF FIRESTONE LAND AT TIME OF SALE	$193,828.94

INDEPENDENT TESTING

Gross Annual Rent	$23,254.68
less 7%	($1,627.83)
Net Rent	$21,626.85
10% Capitalization Rate	$216,268.52
Less Construction Costs (Ex. 66)	($86,750.03)
VALUE OF IND. TESTING LAND AT TIME OF SALE	$129,518.49

JOB #655 FIRESTONE

CODE	CODE DESCRIPTION	
20	PLANS	$1,040.45
30	BUILDING PERMITS	6,950.43
40	INSURANCE	275.00
70	LEGAL	4,604.95
90	DEMOLITION-LABOR COSTS	35.04
100	LAYOUT	530.14
110	EXCAVATION-LABOR COSTS	952.20
110	EXCAVATION-OTHER	6,663.00
120	FOUNDATIONS-LABOR COSTS	4,182.89
120	FOUNDATIONS-OTHER	16,449.04
130	FLOOR SLABS-LABOR	2,040.06
130	FLOOR SLABS-OTHER	6,429.30
160	CONCRETE TESTS	268.50
170	STRUCTURAL FRAMING-LABOR	660.49
170	STRUCTURAL FRAMING -OTHER	14,803.49
180	STRUCTURAL STEEL	3,482.00
200	FINISH CARPENTRY-EXT.	10,114.00
210	HOLOMETAL-LABOR	686.92
210	HOLOMETAL-OTHER	4,417.68
220	MASONRY	21,450.00
230	ROOFING	6,025.00
250	PLUMBING	15,807.06
260	HEATING AND AIR CONDITIONING	20,717.60
270	ELECTRICAL	19,095.00
310	INSULATION	2,574.00
320	DRYWALL	3,980.00
330	PLASTER-LABOR	107.10
360	MISC. STEEL-LABOR	480.99
360	MISC. STEEL-OTHER	327.26
380	CABINETS	554.00
390	FINISH CARPENTRY-INT.-LABOR	922.84
390	FINISH CARPENTRY-INT. - OTHER	1,467.67
400	CONTINGENCIES-LABOR	1,857.06
400	SPECIALTY ITEMS	12,771.67
470	OVERHEAD DOORS-LABOR	610.79
470	OVERHEAD DOORS-OTHER	14,379.02
490	GLASS	4,256.00
500	SITE DRAINAGE-LABOR	157.65
500	SITE DRAINAGE-OTHER	378.00
510	CURB, GUTTER, SIDEWALK-LABOR	2,470.77
510	CURB, GUTTER, SIDEWALK-OTHER	1,112.77
520	ASPHALT PAVING	5,309.80
530	FENCING	240.00
550	CAULKING	326.46
560	PAINTING	6,308.00
570	ACOUSTIC	2,348.00
580	FLOOR COVERING	2,553.59
610	TOILET PARTITIONS	540.00
620	HARDWARE-LABOR	987.82

620	HARDWARE-OTHER	522.03
660	LANDSCAPING	2,948.40
680	SEWER WATER GAS CONNECTIONS	861.65
690	FINISH CLEAN-UP- LABOR	79.18
690	FINISH CLEAN-UP-OTHER	240.99
710	TELEPHONE	359.36
720	UTILITIES	109.21
740	CONTINGENCIES-LABOR	105.00
740	CONTINGENCIES-OTHER	1,337.10
760	SUPERVISION-LABOR COSTS	7,172.27
99 999	PAYROLL BURDEN	3,024.37
	TOTAL ALL CODES	$251,451.06

JOB #691 INDEPENDENT TESTING

CODE	CODE DESCRIPTION	
20	PLANS	$487.93
30	BUILDING PERMITS	435.00
40	INSURANCE	103.00
370	PREHUNG DOORS	98.02
390	FINISH CARPENTRY-INT.	29,978.10
400	SPECIALTY ITEMS-LABOR	135.07
400	SPECIALTY ITEMS- OTHER	546.00
560	PAINTING	385.00
660	LANDSCAPING	7,218.13
680	SEWER WATER GAS CONNECTIONS	2,186.00
740	CONTINGENCIES	44.00
760	SUPERVISION-LABOR COSTS	218.97
780	ADDITIONAL WORK	44,764.90
99 999	PAYROLL BURDEN	149.91
	TOTAL ALL CODES	$86,750.03

JOB # 690 JIFFY LUBE

CODE	CODE DESCRIPTION	
20	PLANS	$1,179.44
30	BUILDING PERMITS	2,840.00
40	INSURANCE	141.00
390	FINISH CARPENTRY-INT.	98,278.65
400	SPECIALTY ITEMS	489.50
640	BLINDS	541.24
660	LANDSCAPING	3,848.28
740	CONTINGENCIES	106.00
760	SUPERVISION-LABOR COSTS	800.19
780	ADDITIONAL WORK	81,741.35
99 999	PAYROLL BURDEN	186.84
	TOTAL ALL CODES	$190,152.49

JOB #674 GIBSON/ON-SITE IMPRS.

CODE	CODE DESCRIPTION	
10	LAND	$1,000.00
20	PLANS	2,229.07
30	BUILDING PERMITS	90.00
40	INSURANCE	9,560.00
60	INTEREST	73,666.36
70	LEGAL	3.00
90	DEMOLITION-LABOR COSTS	3,182.47
100	LAYOUT-LABOR COSTS	320.42
110	EXCAVATION-LABOR COSTS	1,227.97
110	EXCAVATION-OTHER	41,795.75
120	FOUNDATIONS	89.48
170	STRUCTURAL FRAMING	84.57
260	HEATING AND AIR CONDITIONING	950.00
270	ELECTRICAL	2,653.00
280	FIRE SYSTEM	1,497.00
390	FINISH CARPENTRY-INT.-LABOR	88.65
390	FINISH CARPENTRY-INT. - OTHER	264.50
400	CONTINGENCIES-LABOR	459.24
400	SPECIALTY ITEMS	115.71
500	SITE DRAINAGE-LABOR	581.78
500	SITE DRAINABE-OTHER	453.87
510	CURB, GUTTER, SIDEWALK-LABOR	1,893.27
510	CURB, GUTTER, SIDEWALK-OTHER	9,354.90
520	ASPHALT PAVING	31,079.00
530	FENCING	72.00
580	FLOOR COVERING	479.33
660	LANDSCAPING	12,061.61
690	FINISH CLEAN-UP- LABOR	39.06
740	CONTINGENCIES	3,096.74
760	SUPERVISION-LABOR COSTS	1,772.83
99 999	PAYROLL BURDEN	1,994.11
	TOTAL ALL CODES	$202,155.69
	less land (10) and less interest(60)	(74,666.36)
	TOTAL CARRIED TO EXHIBIT 65	$127,489.33

JOB # 808 AMERICAN PUBLISH'G

CODE	CODE DESCRIPTION	
30	BUILDING PERMITS	$224.10
40	INSURANCE	625.00
90	DEMOLITION-LABOR COSTS	121.38
90	DEMOLITION	55.60
130	FLOOR SLABS	299.17
190	INTERIOR FRAME PART	1,462.00
210	HOLOMETAL-LABOR COSTS	121.30
210	HOLOMETAL	576.63
220	MASONRY	296.00
250	PLUMBING	1,135.00
260	HEATING AND AIR CONDITIONING	120.26
270	ELECTRICAL	810.00
350	STAIRWAYS & HANDRAIL	52.02
370	PREHUNG DOORS	174.70
390	FINISH CARPENTRY-INT.	248.84
560	PAINTING	1,394.00
570	ACCOUSTICAL TILE	168.00
580	FLOOR COVERING	1,186.27
610	TOILET PARTITIONS	59.86
620	HARDWARE	11.16
690	FINISH CLEAN-UP-	322.88
740	CONTINGENCIES	177.91
760	SUPERVISION-LABOR COSTS	899.57
99 999	PAYROLL BURDEN	198.50
	TOTAL ALL CODES	$10,740.15

2/21/94

JOB #787 AMERICAN PRINTING

CODE	CODE DESCRIPTION	
130	FLOOR SLABS	$325.00
250	PLUMBING	82.00
270	ELECTRICAL	365.00
320	DRYWALL	1,063.00
370	PREHUNG DOORS	72.53
390	FINISH CARPENTRY-INT.	204.07
490	GLASS	250.00
560	PAINTING	360.00
580	FLOOR COVERING	883.22
690	FINISH CLEAN-UP- LABOR COSTS	35.40
690	FINISH CLEAN-UP	108.00
760	SUPERVISION-LABOR COSTS	149.56
99 999	PAYROLL BURDEN	73.63
	TOTAL ALL CODES	$3,971.41

JOB #781 WEIGHT WATCHERS

CODE	CODE DESCRIPTION	
30	BUILDING PERMITS	$194.22
90	DEMOLITION	843.14
230	ROOFING	17.70
250	PLUMBING	1,085.00
270	ELECTRICAL	1,180.00
320	DRYWALL	1,162.00
370	PREHUNG DOORS	118.57
390	FINISH CARPENTRY-INT. -LABOR	37.84
390	FINISH CARPENTRY-INT.	13.69
400	SPECIALTY ITEMS	43.50
490	GLASS	72.00
560	PAINTING	730.00
570	ACCOUSTICAL TILE	350.00
610	TOILET PARTITIONS	122.53
620	HARDWARE	100.55
690	FINISH CLEAN-UP-LABOR	96.79
740	CONTINGENCIES	26.55
760	SUPERVISION-LABOR COSTS	815.78
99 999	PAYROLL BURDEN	630.75
	TOTAL ALL CODES	$7,640.61

JOB # 719 NORTH SHOPS

CODE	CODE DESCRIPTION	
20	PLANS	$200.00
30	BUILDING PERMITS	177.00
90	DEMOLITION-LABOR COSTS	52.02
90	DEMOLITION-OTHER	146.46
100	LAYOUT	63.48
110	EXCAVATION-LABOR COSTS	164.73
110	EXCAVATION-OTHER	2,292.50
120	FOUNDATIONS-LABOR COSTS	1,733.38
120	FOUNDATIONS-OTHER	2,204.55
130	FLOOR SLABS	133.60
170	STRUCTURAL FRAMING-LABOR	233.10
170	STRUCTURAL FRAMING -OTHER	7,122.57
180	STRUCTURAL STEEL	1,215.75
200	FINISH CARPENTRY-EXT. - LABOR	162.75
200	FINISH CARPENTRY-EXT.	7,660.00
220	MASONRY	10,850.00
230	ROOFING	10,195.00
240	WATERPROOFING	185.00
270	ELECTRICAL	1,355.00
320	DRYWALL	1,689.00
390	FINISH CARPENTRY-INT.	167.47
400	SPECIALTY ITEMS-LABOR	539.74
400	SPECIALTY ITEMS	42,748.20
510	CURB, GUTTER, SIDEWALK-LABOR	5,357.65
510	CURB, GUTTER, SIDEWALK-OTHER	5,031.83
520	ASPHALT PAVING	9,660.88
560	PAINTING	5,277.00
570	ACOUSTICAL TILE	39.60
620	HARDWARE	33.33
660	LANDSCAPING	6,101.61
690	FINISH CLEAN-UP- LABOR	175.77
690	FINISH CLEAN-UP-OTHER	49.28
740	CONTINGENCIES	476.43
760	SUPERVISION-LABOR COSTS	2,216.74
780	WATER SEWER	17,000.00
99 999	PAYROLL BURDEN	3,747.36
	TOTAL ALL CODES	$146,458.78

JOB # 722 J.V. LEASE REPAIR

CODE	CODE DESCRIPTION	
90	DEMOLITION	$84.64
230	ROOFING	266.00
250	PLUMBING	198.20
260	HEATING AND AIR CONDITIONING	500.00
270	ELECTRICAL	175.00
690	FINISH CLEANUP- LABOR	49.28
760	SUPERVISION- LABOR	24.33
99 999	PAYROLL BURDEN	38.28
	TOTAL ALL CODES	$1,335.73

JOB # 841 YOUTH CARE

CODE	CODE DESCRIPTION	
580	FLOOR COVERING	$1,187.08
	TOTAL ALL CODES	$1,187.08

Exhibit L

EXHIBIT 65-- SUMMARY OF RELIANCE DAMAGES

All costs incurred in acquiring and developing all the properties sold to Green Isle 3/91--Ex. 65, subpart "A"	$2,900,402.38
Less those costs associated with acquisition and development of the Firestone and Ind. Test'g properties -- Ex. 65, subpart "B"	($682,585.23)
Equals costs incurred in acquiring and developing the Brockbank property in reliance on Ernst leasing	$2,217,817.16
Less credit for rental income received on North Shops and from Jiffy Lube-- Ex. 65, subpart "C"	($21,311.41)
Less credit for amount received from sale of Brockbank portion Brockbank portion of the property to Green Isle-Ex 65,subpart "D"	($1,688,447.48)
TOTAL OUT-OF-POCKET DAMAGES SUFFERED BY STANGL IN RELIANCE ON ERNST LEASING	$508,058.27

In addition, Mr. Stangl will testify about the loss of the banking relationship.

EXHIBIT 65--- SUBPART "A"
Jordan Valley Plaza
Detailed Costs and Expenditures through 3/8/91

	Description of Costs	
1	Acquisition of Brockbank Property- Ex. 66A	$1,272,351.15
1a	Credit for Aetna escrow funds- Ex. 66A	($23,453.86)
1b	Interest payments on Note to Brockbank (9/88 to 1/91)-Ex. 66C	48,333.43
2	VB&T Loan Origination Fee- Ex. 66B	37,020.00
3	VB & T Title Insurance-Ex. 66B	5,054.00
4	VB & T Legal Fees- Ex.66B	2,167.20
5	VB & T Inspection Fees- Ex. 66B	500.00
6	VB & T Rigby Appraisal Fees- Ex. 66B	4,500.00
7	VB & T Interest through 3/8/91- Ex. 66B	309,977.80
8	Property Taxes- 1988- Ex. 66	34,132.50
9	Value of Firestone Land-Ex. 65, Subpart G	193,828.94
10	Value of Ind,Testing Land-Ex.65, Subpart G	129,518.49
11	Selling Cost for sale to Green Isle- Ex. 48	143,708.00
12	Payment to VB & T at time of sale to Gr. Is.- Ex. 48	120,151.02
13	Tenant expense reimb. Michow/Larsen- Ex. 66	3,084.66
14	Deleted. Included in line item no. 24	0.00
15	Dillman Electric- Ex. 66	950.00
16	Kimball, Parr legal fees- Ex. 66D	3,770.03
17	Firestone expenditures-- Ex. 66	251,451.06
18	Independent Testing expenditures--Ex. 66	86,750.03
19	Jiffy Lube expenditures-- Ex 66	190,152.49
20	On-site expenditures- Ex. 66	127,489.33
21	American Publishing expenditures--Ex. 66	10,740.15
22	American Printing expenditures--Ex. 66	3,971.41
23	Weight Watchers expenditures- Ex. 66	7,640.61
24	North Shops expenditures-Ex. 66	146,458.78
25	Jordan Valley lease repair exp.--Ex. 66	1,335.73
26	Youth Care expenditures- Ex. 66	1,187.06
27	Payments made to reduce principal after default--Ex. 66B	27,963.43
28	Less Loan Reduction Amount--Ex.66B	(240,331.06)
	TOTAL ACQUISITION COSTS AND EXPENDITURES	$2,900,402.38

EXHIBIT 65, SUBPART "A" JORDAN VALLEY PLAZA- DETAILED COSTS
BEFORE AND AFTER 9/30/88

		Before 9/30/88	After 9/30/88	Totals	
1	Acquisition of the Property	$1,272,351.15		$1,272,351.15	
1a	Credit for Aetna escrow funds	($23,453.86)		($23,453.86)	
1b	Interest Paid on Brockbank Note	1,666.67	$46,666.76	$48,333.43	
2	VB&T Loan Orignation Fee	37,020.00		$37,020.00	
3	VB&T Title Insurance	5,054.00		$5,054.00	
4	VB&T Legal Fees	2,167.20		$2,167.20	(11/17/1988)
5	VB&T Inspection Fees	100.00	400.00	$500.00	
6	VB&T Appraisal fee		4,500.00	$4,500.00	
7	VB&T Interest through 3/8/91	22,904.91	287,072.89	$309,977.80	
8	1988 Property Taxes		34,132.50	$34,132.50	
9	Firestone Land	193,828.94		$193,828.94	
10	Emission Testing/Fastech Land	129,518.49		$129,518.49	(3/8/1991)
11	Selling Costs (GreenIsle Sale)		143,708.00	$143,708.00	(3/8/1991)
12	VB&T to close (GreenIsle Sale)		120,151.02	$120,151.02	
13	Tenant Improvement Reimbursement			$0.00	(3/6/1991)
	Minchow/Larsen		3,084.66	$3,084.66	(2/1/1990)
14	Deleted, $375 included in item #24		0.00	$0.00	(10/19/1989)
15	Dillman Electric		950.00	$950.00	
16	Kimball, Parr Legal Fees			$0.00	
	(regarding acquisition)	3,738.78	31.25	$3,770.03	
17	Firestone (hard costs 1/27/88			$0.00	
	through 11/3/88	251,451.06		$251,451.06	(11/22/88-12/10/89)
18	Emission Testing (hard costs)		86,750.03	$86,750.03	(12/31/88-8/8/89)
19	Jiffy Lube (hard costs		190,152.49	$190,152.49	
20	On-Site Improvements (hard costs)	7,380.59	120,108.74	$127,489.33	(3/16/90-11/9/90)
21	American Publishing (hard costs)		10,740.15	$10,740.15	(4/18/90-8/30/90)
22	American Printing (hard costs)		3,971.41	$3,971.41	(3/18/90-6/8/90)
23	Weight Watchers (hard costs)		7,640.61	$7,640.61	(3/12/89-7/31/89)
24	North Shops (hard costs)		146,458.78	$146,458.78	(3/26/89-8/18/89)
25	Jordan Valley Lease Repair (hard costs)		1,335.73	$1,335.73	(11/25/90-12/27/90)
26	Youth Care (hard costs)		1,187.06	$1,187.06	(6/18/90-9/18/90)
27	Principal Reduction Payments		27,963.43	$27,963.43	
28	Less Loan Reduction Amount		(240,331.06)	($240,331.06)	
				$0.00	
	TOTAL	$1,903,727.93	$996,674.45	$2,900,402.38	

EXHIBIT 65A-- ANALYSIS OF PAYMENTS RECORDED FOR ON-SITE IMPROVEMENTS

CATEGORY	POSTED BY 9/30/88	POSTED BY 12/30/88	POSTED BY 4/4/89	POSTED AFTER 4/5/89	CUMULATIVE TOTAL
020 - PLANS	$1,971.57	$133.00		$124.50	2,229.07
030 - BLDG PERMITS	90.00				90.00
040 - INSURANCE		554.00	831.00	8,175.00	9,560.00
070 - LEGAL FEES	3.00				3.00
090 - DEMOLITION	2,807.90	374.57			3,182.47
100 - LAYOUT		320.42			320.42
110 - EXCAVATION		42,666.72	357.00		43,023.72
120 - FOUNDATIONS		89.48			89.48
170 - STRUCTURAL FRAME		84.57			84.57
260 - HEATING & AIR				950.00	950.00
270 - ELECTRICIAL		2,653.00			2,653.00
280 - FIRE SYSTEM			1,497.00		1,497.00
390 - FINISH CARPENTRY	231.93	121.22			353.15
400 - SPECIALTY ITEMS	359.97	201.96	13.02		574.95
500 - SITE DRAINAGE	70.72	964.93			1,035.65
510 - CURB & GUTTER		11,248.17			11,248.17
520 - ASPHALT		31,079.00			31,079.00
530 - FENCING	57.60	14.40			72.00
580 - FLOOR COVERINGS	479.33				479.33
660 - LANDSCAPING		5,690.18	570.00	5,801.43	12,061.61
690 - FINISH CLEANUP		39.06			39.06
740 - CONTINGENCIES	436.00	998.74	1,662.00		3,096.74
760 - SUPERVISION	445.59	1,327.24			1,772.83
999 - PAYROLL BURDEN	426.98	1,563.17	3.96		1,994.11
TOTALS	$7,380.59	$100,123.83	$4,933.98	$15,050.93	127,489.33

EXHIBIT 65—— SUBPART "B"
Costs Associated with Acquisition and Development of
Firestone and Independent Testing Properties

Firestone Land (See Ex. 65, subpart "G")	$193,828.94
Independent Testing Land (See Ex. 65, subpart "G")	$129,518.49
Firestone Construction Costs and Expenditures-Ex. 66	$251,451.06
Independent Testing Costs and Expenditures- Ex. 66	$86,750.03
Interest Paid on these costs-Ex. 65, Subpart "E"	$70,222.35
Less Allocated Share of Loan Reduction- Ex. 65, sub."F"	($49,185.65)
	$682,585.23

EXHIBIT 65-- SUBPART "C"
Total net income received on Jordan Valley Plaza, not including depreciation

Firestone Rent:	$115,710.00
Firestone CAM	$10,066.46
Independent Testing Rent	$47,284.82
Independent Testing CAM	$4,168.31
Total Firestone & Ind. Test'g Rent & CAM	$177,229.59
Total Net Rental Income from Jordan Valley Plaza-- Ex. 65C, p.2	$198,541.00
Less Net Firestone and Ind. Test'g Rent & CAM	($177,229.59)
Total Net Rental Income pertaining to rest of Jordan Valley Plaza	$21,311.41

Calculation of Total Net Rental Income for Ex 65, Subpart "C"

Exhibit 65C -- rents received (actually rent, CAM, & misc income)		
	1988	$33,275 00
	1989	$160,098 00
	1990	$195,082 00
	1991	$42,546 00
	Total	$431,001 00
Exhibit 65C- expenses (including depreciation listed 1988, 1991)		
	1988	($38,588 00)
	1989	($117,603 00)
	1990	($70,643 00)
	1991	($50,768 00)
	Total ex	($277,602 00)
Exhibit 65C identifies Jordan Valley Net Rental Income		
	1988	($5,313 00)
	1989	$42,495 00
	1990	$124,439 00
	1991	($8,222 00)
	Total Net Rental Income for Jordan Valley	$153,399 00
Total net rental income, w/o depr'n 1988-$13,521, 1991-$31,621 total depreciation listed in tax returns= $45,142		$45,142 00
TOTAL NET RENTAL INCOME, NOT INCLUDING DEPREC'N		$198,541 00

EXHIBIT 65-- SUBPART "D"
Analysis of Amount Received for Property
at Time of Sale to Green Isle, Using Income
Valuation Method

Annual Firestone Building Rent	$47,880.00
Annual Independent Testing Building Rent	$23,254.68
TOTAL RENT	$71,134.68
Less 7% (management, repairs,etc.)	($4,979.43)
NET INCOME	$66,155.25
Valuation of Firestone & Ind. Test'g Using 10% Capitalization Rate	$661,552.52
Total Sales Price for all the Properties sold to Green Isle	$2,350,000.00
Less Valuation of Firestone & Ind. Test'g	($661,552.52)
Value of Properties Acquired from Brockbank in anticipation of Ernst leasing the property at the time those properties sold to Green Is.	$1,688,447.48

EXHIBIT 65- SUBPART "E"
Firestone & Ind Testing Interest Calculations
Based on B Exs 66B ,19C

	INTEREST RATE	DESCRIPTION	CRAFT CODE(19C)	INT AMOUNT	IND T'G DISB'T AMT	FIREST DISB'T AMT	TOTAL
8/26/88		CK00027549	OOOO65			$389,896 40	$389,896 40
11/4/88	11 50%	Interest Calculation		$8,599 08			$398,495 48
11/4/88		CK00029122	OOOO42		$4,150 00		$402,645 48
11/4/88		CK00029122	OOOO42		8,407 00		$411,052 48
11/4/88		CK00029122	OOOO65			11,098 16	$422,150 64
11/28/88	11 50%	Interest Calculation		3,192 15			$425,342 79
12/8/88	12 00%	Interest Calculation		1,398 39			$426,741 18
12/8/88		CK00029766	OOOO42		6,624 90		$433,366 08
1/19/89	12 00%	Interest Calculation		5,984 01			$439,350 09
1/19/89		CK00031082	OOOO42		23,353 20		$462,703 29
2/10/89	12 00%	Interest Calculation		3,346 68			$466,049 97
2/14/89	12 50%	Interest Calculation		638 42			$466,688 39
2/14/89		CK00031082	OOOO42		25,828 16		$492,516 55
2/24/89	12 50%	Interest Calculation		1,686 70			$494 203 25
3/14/89	13 00%	Interest Calculation		3,168 32			$497,371 57
3/14/89		CK00031555	OOOO42		2,835 80		$500,207 37
5/16/89	13 00%	Interest Calculation		11,223 83			$511,431 20
5/16/89		CK00032683	OOOO65			18,285 00	$529,716 20
6/1/89	13 00%	Interest Calculation		3,018 66			$532,734 86
6/1/89		CK000321819	OOOO65			11,000 94	$543,735 80
6/5/89	13 00%	Interest Calculation		774 64			$544,510 44
7/11/89	12 50%	Interest Calculation		6,713 14			$551,223 58
11/1/89	12 00%	Interest Calculation		20,478 33			$571,701 91
				$70,222 35	$71,199 06	$430,280 50	$571,701 91

From Ex 19C
OOOO42 refers to "Phase VI"
OOOO65 refers to "Phase VIII"

Ex 311 identifies Phase VI as const'n of North Pad building (Ind Test'g)
Phase VIII as pmt for existing loan, which was Firestone

EXHIBIT 65-- SUBPART "F"
Allocation of Loan Reduction

Ind Test'g Disbursements-- Ex 65, subpart "E"	$71,199 06
Firestone Disbursements-- Ex 65, subpart "E"	$430,280 50
Total Disbursements Ind Test'g and Firestone	$501,479 56
Total Loan Balance Before Reduction as shown on Ex 66B	$2,450,331 06
Ratio of Ind Test'g/Firestone to Total	20%
Loan Reduction Amount-- Ex 66B	$240,331 06
Ind Test'g/Firestone portion of reduction	$49,185 65

EXHIBIT 65– SUBPART "G"
Calculation of land
values for Firestone & IET

FIRESTONE

Gross Annual Rent	$47,880 00
less 7%(repairs, reserves,etc)	($3,352 00)
Net Rent	$44,528 00
10% Capitilization Rate	$445,280 00
Less Construction Costs (Ex 66)	($251,451 06)
VALUE OF FIRESTONE LAND AT TIME OF SALE	$193,828 94

INDEPENDENT TESTING

Gross Annual Rent	$23,254 68
less 7%	($1,627 83)
Net Rent	$21,626 85
10% Capitalization Rate	$216,268 52
Less Construction Costs (Ex 66)	($86,750 03)
VALUE OF IND TESTING LAND AT TIME OF SALE	$129,518 49

JOB #655 FIRESTONE

CODE	CODE DESCRIPTION	
20	PLANS	$1,040.45
30	BUILDING PERMITS	6,950.43
40	INSURANCE	275.00
70	LEGAL	4,604.95
90	DEMOLITION-LABOR COSTS	35.04
100	LAYOUT	530 14
110	EXCAVATION-LABOR COSTS	952 20
110	EXCAVATION-OTHER	6,663 00
120	FOUNDATIONS-LABOR COSTS	4,182 89
120	FOUNDATIONS-OTHER	16,449 04
130	FLOOR SLABS-LABOR	2,040 06
130	FLOOR SLABS-OTHER	6,429 30
160	CONCRETE TESTS	268 50
170	STRUCTURAL FRAMING-LABOR	660 49
170	STRUCTURAL FRAMING -OTHER	14,803 49
180	STRUCTURAL STEEL	3,482 00
200	FINISH CARPENTRY EXT	10,114 00
210	HOLOMETAL-LABOR	686 92
210	HOLOMETAL OTHER	4,417 68
220	MASONRY	21,450 00
230	ROOFING	6,025.00
250	PLUMBING	15,807.06
260	HEATING AND AIR CONDITIONING	20,717.60
270	ELECTRICAL	19,095.00
310	INSULATION	2,574.00
320	DRYWALL	3,980 00
330	PLASTER-LABOR	107 10
360	MISC STEEL-LABOR	480 99
360	MISC STEEL-OTHER	327 26
380	CABINETS	554 00
390	FINISH CARPENTRY-INT -LABOR	922 84
390	FINISH CARPENTRY-INT OTHER	1,467 67
400	CONTINGENCIES-LABOR	1,857 06
400	SPECIALTY ITEMS	12,771 67
470	OVERHEAD DOORS LABOR	610 79
470	OVERHEAD DOORS OTHER	14,379 02
490	GLASS	4,256 00
500	SITE DRAINAGE-LABOR	157 65
500	SITE DRAINABE OTHER	378 00
510	CURB GUTTER, SIDEWALK LABOR	2,470 77
510	CURB GUTTER SIDEWALK OTHER	1,112 77
520	ASPHALT PAVING	5,309 80
530	FENCING	240 00
550	CAULKING	326 46
560	PAINTING	6,308 00
570	ACOUSTIC	2,348 00
580	FLOOR COVERING	2,553 59
610	TOILET PARTITIONS	540 00
620	HARDWARE LABOR	987 82

620	HARDWARE-OTHER	522.03
660	LANDSCAPING	2,948.40
680	SEWER WATER GAS CONNECTIONS	851.65
690	FINISH CLEAN-UP- LABOR	79.18
690	FINISH CLEAN-UP-OTHER	240.99
710	TELEPHONE	359.36
720	UTILITIES	109.21
740	CONTINGENCIES-LABOR	105.00
740	CONTINGENCIES-OTHER	1,337.10
760	SUPERVISION-LABOR COSTS	7,172.27
99 999	PAYROLL BURDEN	3,024.37
	TOTAL ALL CODES	$251,451.06

JOB #691 INDEPENDENT TESTING

CODE	CODE DESCRIPTION	
20	PLANS	$487.93
30	BUILDING PERMITS	435.00
40	INSURANCE	103.00
370	PREHUNG DOORS	98.02
390	FINISH CARPENTRY-INT.	29,978.10
400	SPECIALTY ITEMS-LABOR	135.07
400	SPECIALTY ITEMS- OTHER	546.00
560	PAINTING	385.00
660	LANDSCAPING	7,218.13
680	SEWER WATER GAS CONNECTIONS	2,186.00
740	CONTINGENCIES	44.00
760	SUPERVISION-LABOR COSTS	218.97
780	ADDITIONAL WORK	44,764.90
99 999	PAYROLL BURDEN	149.91
	TOTAL ALL CODES	$86,750.03

JOB # 690 JIFFY LUBE

CODE	CODE DESCRIPTION	
20	PLANS	$1,179.44
30	BUILDING PERMITS	2,840.00
40	INSURANCE	141.00
390	FINISH CARPENTRY-INT.	98,278.65
400	SPECIALTY ITEMS	489.50
640	BLINDS	541.24
660	LANDSCAPING	3,848.28
740	CONTINGENCIES	106.00
760	SUPERVISION-LABOR COSTS	800.19
780	ADDITIONAL WORK	81,741.35
99 999	PAYROLL BURDEN	186.84
	TOTAL ALL CODES	$190,152.49

JOB #674 GIBSON/ON-SITE IMPRS.

CODE	CODE DESCRIPTION	
10	LAND	$1,000.00
20	PLANS	2,229.07
30	BUILDING PERMITS	90.00
40	INSURANCE	9,560.00
60	INTEREST	73,666.36
70	LEGAL	3.00
90	DEMOLITION-LABOR COSTS	3,182.47
100	LAYOUT-LABOR COSTS	320.42
110	EXCAVATION-LABOR COSTS	1,227.97
110	EXCAVATION-OTHER	41,795.75
120	FOUNDATIONS	89.48
170	STRUCTURAL FRAMING	84.57
260	HEATING AND AIR CONDITIONING	950.00
270	ELECTRICAL	2,653.00
280	FIRE SYSTEM	1,497.00
390	FINISH CARPENTRY-INT.-LABOR	88.65
390	FINISH CARPENTRY-INT. - OTHER	264.50
400	CONTINGENCIES-LABOR	459.24
400	SPECIALTY ITEMS	115.71
500	SITE DRAINAGE-LABOR	581.78
500	SITE DRAINABE-OTHER	453.87
510	CURB, GUTTER, SIDEWALK-LABOR	1,893.27
510	CURB, GUTTER, SIDEWALK-OTHER	9,354.90
520	ASPHALT PAVING	31,079.00
530	FENCING	72.00
580	FLOOR COVERING	479.33
660	LANDSCAPING	12,061.61
690	FINISH CLEAN-UP- LABOR	39.06
740	CONTINGENCIES	3,096.74
760	SUPERVISION-LABOR COSTS	1,772.83
99 999	PAYROLL BURDEN	1,994.11
	TOTAL ALL CODES	$202,155.69
	less land (10) and less interest(60)	(74,666.36)
	TOTAL CARRIED TO EXHIBIT 65	$127,489.33

JOB # 808 AMERICAN PUBLISH'G

CODE	CODE DESCRIPTION	
30	BUILDING PERMITS	$224.10
40	INSURANCE	625.00
90	DEMOLITION-LABOR COSTS	121.38
90	DEMOLITION	55.60
130	FLOOR SLABS	299.17
190	INTERIOR FRAME PART	1,462.00
210	HOLOMETAL-LABOR COSTS	121.30
210	HOLOMETAL	576.63
220	MASONRY	296.00
250	PLUMBING	1,135.00
260	HEATING AND AIR CONDITIONING	120.26
270	ELECTRICAL	810.00
350	STAIRWAYS & HANDRAIL	52.02
370	PREHUNG DOORS	174.70
390	FINISH CARPENTRY-INT.	248.84
560	PAINTING	1,394.00
570	ACCOUSTICAL TILE	168.00
580	FLOOR COVERING	1,186.27
610	TOILET PARTITIONS	59.86
620	HARDWARE	11.16
690	FINISH CLEAN-UP-	322.88
740	CONTINGENCIES	177.91
760	SUPERVISION-LABOR COSTS	899.57
99 999	PAYROLL BURDEN	198.50
	TOTAL ALL CODES	$10,740.15

2/21/94

JOB #787 AMERICAN PRINTING

CODE	CODE DESCRIPTION	
130	FLOOR SLABS	$325.00
250	PLUMBING	82.00
270	ELECTRICAL	365.00
320	DRYWALL	1,063.00
370	PREHUNG DOORS	72.53
390	FINISH CARPENTRY-INT.	204.07
490	GLASS	250.00
560	PAINTING	360.00
580	FLOOR COVERING	883.22
690	FINISH CLEAN-UP- LABOR COSTS	35.40
690	FINISH CLEAN-UP	108.00
760	SUPERVISION-LABOR COSTS	149.56
99 999	PAYROLL BURDEN	73.63
	TOTAL ALL CODES	$3,971.41

JOB #781 WEIGHT WATCHERS

CODE	CODE DESCRIPTION	
30	BUILDING PERMITS	$194.22
90	DEMOLITION	843.14
230	ROOFING	17.70
250	PLUMBING	1,085.00
270	ELECTRICAL	1,180.00
320	DRYWALL	1,162.00
370	PREHUNG DOORS	118.57
390	FINISH CARPENTRY-INT. -LABOR	37.84
390	FINISH CARPENTRY-INT.	13.69
400	SPECIALTY ITEMS	43.50
490	GLASS	72.00
560	PAINTING	730.00
570	ACCOUSTICAL TILE	350.00
610	TOILET PARTITIONS	122.53
620	HARDWARE	100.55
690	FINISH CLEAN-UP-LABOR	96.79
740	CONTINGENCIES	26.55
760	SUPERVISION-LABOR COSTS	815.78
99 999	PAYROLL BURDEN	630.75
	TOTAL ALL CODES	$7,640.61

JOB # 719 NORTH SHOPS

CODE	CODE DESCRIPTION	
20	PLANS	$200.00
30	BUILDING PERMITS	177.00
90	DEMOLITION-LABOR COSTS	52.02
90	DEMOLITION-OTHER	146.46
100	LAYOUT	63.48
110	EXCAVATION-LABOR COSTS	164.73
110	EXCAVATION-OTHER	2,292.50
120	FOUNDATIONS-LABOR COSTS	1,733.38
120	FOUNDATIONS-OTHER	2,204.55
130	FLOOR SLABS	133.60
170	STRUCTURAL FRAMING-LABOR	233.10
170	STRUCTURAL FRAMING -OTHER	7,122.57
180	STRUCTURAL STEEL	1,215.75
200	FINISH CARPENTRY-EXT. - LABOR	162.75
200	FINISH CARPENTRY-EXT.	7,660.00
220	MASONRY	10,850.00
230	ROOFING	10,195.00
240	WATERPROOFING	185.00
270	ELECTRICAL	1,355.00
320	DRYWALL	1,689.00
390	FINISH CARPENTRY-INT.	167.47
400	SPECIALTY ITEMS-LABOR	539.74
400	SPECIALTY ITEMS	42,748.20
510	CURB, GUTTER, SIDEWALK-LABOR	5,357.65
510	CURB, GUTTER, SIDEWALK-OTHER	5,031.83
520	ASPHALT PAVING	9,660.88
560	PAINTING	5,277.00
570	ACOUSTICAL TILE	39.60
620	HARDWARE	33.33
660	LANDSCAPING	6,101.61
690	FINISH CLEAN-UP- LABOR	175.77
690	FINISH CLEAN-UP-OTHER	49.28
740	CONTINGENCIES	476.43
760	SUPERVISION-LABOR COSTS	2,216.74
780	WATER SEWER	17,000.00
99 999	PAYROLL BURDEN	3,747.36
	TOTAL ALL CODES	$146,458.78

JOB # 722 J.V. LEASE REPAIR

CODE	CODE DESCRIPTION	
90	DEMOLITION	$84.64
230	ROOFING	266.00
250	PLUMBING	198.20
260	HEATING AND AIR CONDITIONING	500.00
270	ELECTRICAL	175.00
690	FINISH CLEANUP- LABOR	49.28
760	SUPERVISION- LABOR	24.33
99 999	PAYROLL BURDEN	38.28
	TOTAL ALL CODES	$1,335.73

JOB # 841 YOUTH CARE

CODE	CODE DESCRIPTION	
580	FLOOR COVERING	$1,187.06
	TOTAL ALL CODES	$1,187.06

Exhibit M

EXHIBIT 65-- SUMMARY OF RELIANCE DAMAGES

All costs incurred in acquiring and developing all the properties sold to Green Isle 3/91--Ex. 88, subpart "A"	$2,900,402.38
Less those costs associated with acquisition and development of the Firestone and Ind. Test'g properties -- Ex. 65, subpart "B"	($682,585.23)
Equals costs incurred in acquiring and developing the Brockbank property in reliance on Ernst leasing	$2,217,817.16
Less credit for rental income received on North Shops and from Jiffy Lube-- Ex. 65, subpart "C"	($122,061.08)
Less credit for amount received from sale of Brockbank portion Brockbank portion of the property to Green Isle-Ex 65,subpart "D"	($1,688,447.48)
TOTAL OUT-OF-POCKET DAMAGES SUFFERED BY STANGL IN RELIANCE ON ERNST LEASING	$407,308.60

In addition, Mr. Stangl will testify about the loss of the banking relationship.

Escrow adj → (20,151)
Jack Green Note (1,50,314)
Allocate Loan origination (7,457)
Allocate Legal Fees (433)
Allocate selling cost (40,230)
Firestone CAM (10,066)
IET CAM (4,168)
Estimate Expenses To Rent IET and Firestone (10,000)

64,856

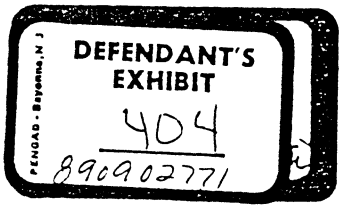


Exhibit N

Stephen G. Crockett, Esq. (0766)
Stephen T. Hard, Esq. (1359)
Steven E. McCowin, Esq. (4621)
GIAUQUE, CROCKETT,
BENDINGER & PETERSON
500 Kearns Building
136 South Main Street
Salt Lake City, UT 84101
Telephone: (801) 533-8383

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

FRANZ C. STANGL, III, an individual, dba F.C. STANGL CONSTRUCTION COMPANY, Plaintiff, v. ERNST HOME CENTER, INC., a Washington corporation, Defendant.	PLAINTIFF'S RESPONSE TO OBJECTION Civil No. 89-090-2771-CN (Honorable Michael Murphy)

I. Ernst has been provided notice of Stangl's claim for interest on the Brockbank Note for $250,000.

A. In response to Defendant's First Set of Interrogatories, at p. 26, Stangl alleged that "Stangl acquired ownership of the subject property and took other actions of a substantial nature, involving the expenditure of large amounts of Stangl's time and money..." At p. 41 of the same responses, Stangl stated: "In addition, Stangl's damages will include the costs incurred by Stangl in connection with performance of his obligations under the lease... and the costs of Stangl's efforts to mitigate damages.....and Stangl has incurred additional

interest expense on loans as a result of Ernst's having failed to honor the lease agreement." Copy attached hereto as Exhibit "A".

All subsequent responses to updating of interrogatory answers referred to prior discovery responses.

II. Ernst has been provided with evidence as to the amount of the Brockbank interest.

A. Option agreement (Exhibit "B" hereto, trial exhibit 5 refers to the fact that if the option was exercised, it would be payable, in part, with a $250,000 promissory note which was to be interest only payments of $1,666.67/month)

B. $250,000 promissory note (Exhibit "C" hereto, deposition exhibit 130) was produced, which specifically described the interest payments of $1,666.67 per month.

C. The $250,000 promissory note was the subject of examination at deposition wherein Mr. Stangl disclosed that he had been making the payments and that he believed that he was current. See depo testimony at p. 363, attached hereto as Exhibit "D".

D. Exhibit 65C (Exhibit "E" hereto) was previously produced last year. Therein income tax schedules and income statements are attached which disclose the interest paid on both the Valley Bank loan and the Brockbank loan.

E. During last year's trial, Messrs. Greenwood and O'Hara visited plaintiff's counsel's office where they were offered the backup documentation for the schedules attached to

Exhibit 65C. Those included the general ledgers for the rental income and expenses which broke out the interest expenses paid for both the Brockbank and the Valley Bank loans. See, e.g. General ledger for 1989, at p. 10 (Account Code 4600- R. Brockbank Note Interest), p.15 (Account Code 6950- Interest Expense [Valley Bank]), copy attached hereto as Exhibit "F".

DATED this 23rd day of February, 1994.

GIAUQUE, CROCKETT,
BENDINGER & PETERSON
136 S. Main Street
Salt Lake City, Utah 84101
Telephone: (801) 533-8383

BY _____
Stephen T. Hard
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

On the 23rd day of February, 1994, a true and correct copy of PLAINTIFF'S RESPONSE TO OBJECTION was hand-delivered to the following:

Elizabeth D. Winter
VAN COTT, BAGLEY, CORNWALL & McCARTHY
50 South Main Street
Salt Lake City, UT 84144

Roger J. Kindley
RYAN, SWANSON & CLEVELAND
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034

_____

Exhibit A

Stephen G. Crockett, Esq. (A0766)
Kenneth C. Johnsen, Esq. (A4605)
Daniel A. Jensen, Esq. (A5296)
KIMBALL, PARR, CROCKETT & WADDOUPS
185 South State Street, Suite 1300
Post Office Box 11019
Salt Lake City, Utah 84147
Telephone: (801) 532-7840
Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

F. C. STANGL, III, an individual, Plaintiff, vs. ERNST HOME CENTER, INC., a Washington corporation, Defendant.	ANSWER TO DEFENDANT'S ~~SECOND~~ 1st SET OF INTERROGATORIES AND ~~SECOND~~ 1st DOCUMENT REQUEST Civil No. 89-0202771CN Judge Michael Murphy JURY TRIAL DEMANDED

Plaintiff, Franz C. Stangl, III ("Stangl"), responds to Defendant's Second Set of Interrogatories and Second Document Request as follows:

GENERAL OBJECTIONS TO INTERROGATORIES

GENERAL OBJECTION NO. 1: Stangl objects to the interrogatories insofar as they seek information not available to him at this time. To date, Stangl has not completed any discovery in this case. Stangl believes that many documents and witnesses

INTERROGATORY NO. 14: With regard to the allegations set forth in Paragraph 17 of the Complaint, please provide the following information:

(a) State the factual basis of these allegations;

(b) Identify all documents disclosing or relating to these allegations;

(c) Identify all persons with knowledge disclosing or relating to these allegations; and

(d) Identify all conversations or communications disclosing or relating to these allegations.

RESPONSE: Stangl objects to Interrogatory No. 14 on the grounds that it is vague and ambiguous, overbroad, burdensome and seeks privileged information. At this early stage of the case, it is impossible for Stangl to identify each and every fact or document that might support his claim. Furthermore, many such facts or documents may be privileged. Nevertheless, for purposes of furthering discovery in this matter and without waiving the foregoing objections, Stangl responds to Interrogatory No. 14 as follows.

(a) Based on the promises, commitments and representations made to Stangl by Ernst (see Response to Interrogatory No. 13), Stangl acquired ownership of the subject property and took other actions of a substantial nature, involving

the expenditure of large amounts of Stangl's time and money, which actions included without limitation the following:

1. Stangl made plans and estimates, solicited and reviewed bids, and otherwise prepared to construct new improvements and remodel old improvements on the property according to Ernst's specifications, instructions and desires (see, e.g., notes of discussion with Rob King dated July 1, 1988; notes from Larry Burton dated July 5, 1988; Utah Tile and Roofing bid dated July 22, 1988; Steel Encounters bid dated August 1, 1988; construction estimate dated August 3, 1988; environmental summary notes by Larry Burton dated August 9, 1988; construction notes prepared by Larry Burton (undated); letter dated August 12, 1988 setting forth Ernst's specifications for asphalt paving, planters and curbs, light standards, etc.; construction estimate dated August 31, 1988; letter dated September 12, 1988 from Stangl to Rob King; construction notes dated September 12, 1988 by Jenny Hall).

2. Stangl dealt at length with Ernst, its architects and engineers to facilitate construction and remodeling according to Ernst's specifications, instructions and desires (see e.g., transmittal records from Dykeman Architects dated July 5, 1988 (3 documents), July 8, 1988, July 14, 1988; letter dated July 7, 1988 from Dykeman Architects to West Jordan City Planner; notes from Larry Burton dated July 8, 1988; Structural Calculations for Ernst Home and Nursery, West Jordan, Utah, prepared by Dykeman

Architects, dated July 20, 1988; phone message from Rob King dated July 26, 1988; Ernst sign specifications for West Jordan Store No. 280, prepared by Dykeman Architects, dated August 24, 1988).

3. Stangl initiated, pursued and obtained zoning and construction applications, approvals and permits (see, e.g., letter dated July 7, 1988 from Dykeman Architects to West Jordan City Planner; Application to Planning Commission dated July 8, 1988; letter dated July 19, 1988 from City of West Jordan to Stangl; Report of Action and minutes of meeting held July 20, 1988 by City of West Jordan Planning and Zoning Commission; West Jordan Planning Commission Agenda dated July 20, 1988; Report of Action and minutes of meeting held August 3, 1988 by City of West Jordan Planning and Zoning Commission; Reports of Action and minutes of meeting held September 21, 1988 by City of West Jordan Planning and Zoning Commission; Report of Action by West Jordan Planning and Zoning Commission dated September 7, 1988).

4. Stangl sought to obtain financing for the construction to be done at Ernst's request (see, e.g., letter dated July 16, 1988 (and attachments) from Stangl to Valley Mortgage Corp.).

5. Stangl provided market information to Ernst and attempted to assist Ernst in verifying the potential profitability of the Jordan Valley Plaza site (see, e.g., letter dated November 30, 1988 from Stangl to Tom Stanton; letter dated April 4, 1989

from Stangl to Tom Stanton, p. 3 (referring to Stangl's efforts to find Ernst another market analyst)).

6. Stangl refrained from attempting to lease the property to other lessees while Ernst tried to resolve its uncertainty regarding its decision to locate an Ernst store on the subject property (see, e.g. letter dated April 4, 1989 from Stangl to Tom Stanton, p. 3).

The above actions were taken to accommodate Ernst, to comply with Stangl's obligations under the lease agreement, and to assist Ernst in its efforts to open a store at the Jordan Valley Plaza site. The actions were undertaken with Ernst's full knowledge and approval, and in many cases with Ernst's actual involvement. All actions were undertaken with Ernst's approval, encouragement and representation that such actions were performed pursuant to a binding agreement to lease the property. It was apparently only after Mack DuBose, Ernst's primary agent with respect to the lease agreement, left Ernst's employ that Ernst decided it would not abide by and honor the lease agreement. The above actions by Stangl were completely reasonable in light of the circumstances and in light of Ernst's statements, promises, documents and conduct. Stangl would not have undertaken such actions if not for Ernst's statements, promises, documents and conduct.

(b) See documents identified in part (a) above and documents produced herewith.

(c) See Response to Interrogatory No. 2.

(d) See Response to Interrogatory No. 3(d).

INTERROGATORY NO. 15: With regard to the allegations set forth in Paragraph 18 of the Complaint, please provide the following information:

(a) State the factual basis of these allegations;

(b) Identify all documents disclosing or relating to these allegations;

(c) Identify all persons with knowledge disclosing or relating to these allegations; and

(d) Identify all conversations or communications disclosing or relating to these allegations.

RESPONSE: Stangl objects to Interrogatory No. 15 on the grounds that it is vague and ambiguous, overbroad, burdensome and seeks privileged information. At this early stage of the case, it is impossible for Stangl to identify each and every fact or document that might support his claim. Furthermore, many such facts or documents may be privileged. Nevertheless, for purposes of furthering discovery in this matter and without waiving the foregoing objections, Stangl responds to Interrogatory No. 15 as follows:

(a) See Responses to Interrogatory Nos. 12-14.

(b) Id.

(c) Id.

(d) Id.

INTERROGATORY NO. 21: In Paragraphs 1(a), 2(a), and 3(a) of the Prayer for Relief section of your Complaint (at pages 8 and 9), you pray "for judgment in favor of Stangl and against defendant in an amount to be proved at trial, together with pre-judgment interest accruing thereon and post-judgment interest accruing thereon plus attorneys' fees and costs incurred herein." With regard to the aforesaid portions of your Prayer for Relief, please specify the following:

(a) The dollar amount of all damages sustained by Stangl, including without limitation all general and/or consequential damages allegedly sustained by Stangl which Stangl seeks to recover from Ernst, measured and calculated through and including the date of your answers to these interrogatories;

(b) The facts, assumptions and figures used to arrive at the figure specified in response to subparagraph (a);

(c) All documents evidencing your alleged damages, including without limitation all general and/or consequential damages;

(d) The factual basis for any and all general damages which you claim;

(e) The factual basis for any consequential damages which you claim;

(f) The factual basis for any and all other items or damages which you claim;

(g) The dollar amount of pre-judgment interest you claim as of the date of your answers to these interrogatories, including the statutory and/or contractual basis for the alleged pre-judgment interest, the percent per annum you claim applies to pre-judgment interest, the calculation used by you to arrive at the dollar amount of your alleged pre-judgment interest, and any documents which evidence your claim to pre-judgment interest;

(h) The percent per annum which you claim will apply to post-judgment interest, if any judgment be entered against Ernst, and the factual basis for your claimed post-judgment rate of interest;

(i) The precise contractual language, if any, and date of the document containing the contractual language upon which you rely for your claim of attorneys' fees;

(j) The precise statutory provision, if any, you rely upon for your claim of attorneys' fees.

RESPONSE: Stangl objects to Interrogatory No. 21 on the grounds that it is vague and ambiguous, overbroad, burdensome and may seek privileged information. Without waiving the foregoing objections, Stangl responds to Interrogatory No. 21 as follows:

At this stage in the litigation, Stangl has not calculated his damages caused by Ernst's actions to the degree of specificity

described in Interrogatory No. 21. As intimated in previous responses, the actual amount of damages suffered by Stangl will not be known until further discovery has occurred. As a general matter, Stangl believes his damages will equal an amount which includes the lease payments that, at least through the date of this response, have not been paid by Ernst, together with future lease payments to the extent that mitigation of damages is not possible. In addition, Stangl's damages will include the costs incurred by Stangl in connection with performance of his obligations under the lease (see, e.g., Response to Interrogatory 14) and the costs of Stangl's efforts to mitigate damages. Stangl has also suffered reputational damages with third parties to which he indicated that an agreement with Ernst had been met, and Stangl has incurred additional interest expense on loans as a result of Ernst's having failed to honor the lease agreement. Stangl will seek pre-judgment and post-judgment interest in accordance with applicable law, including Chapter 1 of Title 15 of the Utah Code. Similarly, Stangl will seek attorneys' fees and costs to the extent he is able to establish that the parties agreed to pay such amounts or to the extent that the evidence indicates that Stangl is otherwise entitled to such amounts under applicable law. The factual basis and documents upon which Stangl seeks damages, to the extent currently known, are described in response to other discovery requests.

5. Letter dated July 15, 1988 from Mack DuBose to Stangl.

6. Letter dated August 23, 1988 from Mack DuBose to Stangl.

7. Letter dated August 29, 1988 from Stangl to Mack DuBose.

8. Letter dated September 12, 1988 from Mack DuBose to Stangl.

As for the legal description of the property to be leased, see Response to Interrogatory No. 36.

(b) See Response to part (a) above.

INTERROGATORY NO. 23: During the discovery period, did you obtain an option from a third party to purchase all or some of the real property referenced in your complaint. If so, please provide the following information:

(a) From whom did you obtain the option;

(b) How much did you pay for the option;

(c) What were the precise terms of the option;

(d) Under the terms of the option, did you have any obligation whatsoever to exercise the option;

(e) Please identify all documents evidence the option;

(f) Please identify all documents containing any information whatsoever about the option, the negotiations leading up to the purchase and/or execution by you of the option, and/or

disputes, if any, between you and third parties concerning the option.

RESPONSE: Stangl objects to Interrogatory No. 23 on the grounds that it is vague and ambiguous, overbroad, burdensome and seeks privileged information. Without waiving the foregoing objections, Stangl responds to Interrogatory No. 23 as follows:

Yes.

(a) See Option dated June 29, 1988 produced herewith and related documents produced herewith.

(b) Id.

(c) Id.

(d) Id.

(e) Id.

(f) Id.

INTERROGATORY NO. 24: Have you at any time obtained any market studies, business plans, options, leases, policies of title insurance, preliminary title reports, or litigation title reports concerning all or part of the Premises or Property (as those terms are used in your Complaint)? If so, please provide the following information:

(a) Please identify by date and title all such documents and all persons who gave you said documents and/or prepared said documents;

seeks irrelevant and privileged information. Without waiving the foregoing objections, Stangl responds to Interrogatory No. 25 as follows:

Yes. Stangl shall produce non-privileged documents which provide Ernst with the relevant information sought hereby.

(a) Further to the response of Interrogatory No. 38, the amount of consideration paid to Mr. Brockbank by Stangl is reflected on the Option dated June 29, 1988 and produced herewith. There are no ongoing negotiations between Stangl and Mr. Brockbank concerning the subject property.

(b) See documents identified in part (a) above and documents produced herewith.

INTERROGATORY NO. 26: If you claim any item of damages whatsoever not described in response to any of the preceding interrogatories, please state the factual basis for each and every other item of damage you claim against Ernst. In response to this interrogatory, please also identify each and every other document not identified in response to any of the preceding interrogatories which contains any information whatsoever regarding your damage claims against Ernst. Also, in responding to this interrogatory, please state all facts upon which you rely to support your contention that the damages described in response to this interrogatory were caused by Ernst.

RESPONSE: Stangl objects to Interrogatory No. 26 on the grounds that it is vague and ambiguous, overbroad, burdensome, repetitive and seeks privileged information. Without waiving the foregoing objections, Stangl responds to Interrogatory No. 26 as follows:

See Response to Interrogatory No. 21, which sets forth Stangl's response regarding damages caused by Ernst. Stangl reiterates that most of the discovery in this matter remains to be completed. Accordingly, additional bases for damage claims against Ernst may be substantiated later pursuant to further discovery.

INTERROGATORY NO. 27: Please state the precise date and time you claim the contract alleged in the Complaint became binding upon you and Ernst, and please explain in reasonable factual detail the basis for the date stated in response to this interrogatory.

RESPONSE: Stangl objects to Interrogatory No. 27 on the grounds that it is premature, overbroad, and burdensome. Without waiving the foregoing objections, Stangl responds to Interrogatory No. 27 as follows:

As explained in prior Responses herein, the precise date and time at which the lease agreement became binding on Ernst is not known without further discovery concerning this matter. Current information indicates that the agreement was certainly binding no later than September 14, 1988, when Stangl and Mack DuBose met in Stangl's office and agreed to all remaining details of the agreed

INTERROGATORY NO. 37: As you use the term the "Property" in paragraph 6 of your Complaint, please provide a metes and bounds description of the "Property."

RESPONSE: The "Property" as used in paragraph 6 of Stangl's complaint comprises the property acquired from Roger R. Brockbank on August 5, 1988, which includes the subject property that Ernst agreed to lease. A metes and bounds description of the Property can be found in the Warranty Deed dated August 5, 1988 from Roger R. Brockbank to F. C. Stangl III, produced herewith.

INTERROGATORY NO. 38: In chronological order, starting in the beginning and coming forward to the present time, please state in reasonable factual detail the history of Stangl's ownership interest and/or leasehold interest and/or option interest in all or part of the real property described in paragraph 5 of your Complaint as the "Premises" and/or the real property described in paragraph 6 of your Complaint as the "Property." In your answer, please describe the entire history of Stangl's ownership interest and/or leasehold interest and/or option interest in the aforesaid real property, including but not limited to the nature of Stangl's ownership and/or leasehold and/or option interest in all or part of said real property at any time, including but not limited to 1981 and thereafter as part of the joint venture called Stangl-Alliance.

RESPONSE: Stangl objects to Interrogatory No. 38 on the grounds that it is vague and ambiguous, overbroad, burdensome and seeks privileged information. Without waiving the foregoing objections, Stangl responds to Interrogatory No. 38 as follows:

Stangl-Alliance, a joint venture comprised of Stangl and Alliance Enterprises, Inc. owned the Jordan Valley Plaza Shopping Center, which encompasses the subject property. Stangl-Alliance sold it in approximately 1981 to Bruce R. Brockbank, Jeanne D. Brockbank, Roger R. Brockbank and Leda A. Brockbank. The sale was secured by a trust deed in favor of Stangl-Alliance with Western States Title Company as trustee. The trust deed was subsequently assigned by Western States to Aetna Life Insurance Company in 1987. The Brockbanks eventually defaulted on their mortgage, causing Aetna to begin foreclosure proceedings against the Brockbanks. The four Brockbank owners conveyed their interest to Roger R. Brockbank, who then filed for bankruptcy. The property was thereafter tied up in bankruptcy court.

By early June, 1988, negotiations to lease the property began between Stangl and Ernst. Stangl agreed to acquire the property provided Ernst would lease it on a long term basis from Stangl (see Response to Interrogatory No. 5). Based on a preliminary agreement with Ernst, Stangl obtained an option to acquire the subject property from Roger Brockbank on June 29, 1988.

Ernst proceeded to begin architectural work and construction planning for the store to be built on the leased property and, with Stangl, began meeting with planning and zoning officials in West Jordan. On July 8, Mack DuBose sent a document containing lease items not previously discussed and pointing out some errors in the earlier agreement. On July 14, Stangl sent a revised document containing the corrections and details agreed to by Stangl and DuBose in a telephone conversation between them. DuBose responded on July 15, 1988 with a letter to Stangl stating in part:

> After we have completed our Offer To Lease, this document will be modified to incorporate our business points. We are sending this in advance of the signed document so that the lease execution can be facilitated to keep us on schedule for an October 1, 1988 turnover.
>
> I would appreciate your review of this document so that we can resolve any issues that are not clearly outlined in our business agreement.

(Emphasis added.)

Believing that a binding lease agreement was in place, Stangl exercised his option to purchase the property on July 28, 1988. With the consent of Aetna and the bankruptcy court, Stangl purchased the subject property out of bankruptcy, purchased Aetna's beneficial interest, and received a Warranty Deed from Roger R. Brockbank on August 5, 1988. Stangl remains the owner of the property at the present time.

Exhibit B

"This is a legally binding form if not understood, seek competent advice"

OPTION

KNOW ALL MEN BY THESE PRESENTS

That JORDAN VALLEY ASSOCIATES and/or ROGER R BROCKBANK
of Salt Lake City, UT hereinafter referred to as "Seller" hereby agrees for and in consideration of ONE THOUSAND AND NO/100---------- ($ 1,000 00) Dollars, paid by F C Stangl III, a real estate broker buying for his own account
of Salt Lake City, UT hereinafter referred to as "Buyer", as follows

1 PROPERTY Seller hereby gives and grants to Buyer and to his heirs and assigns for a period of ~~X~~ 7 months from the date hereof hereinafter referred to as First Option Period the exclusive right and privilege of purchasing the following described real property located at 1755 W 90th S (SW Corner Redwood Rd/90th S) County of Salt Lake State of Utah , and more particularly described as follows

318,507 square feet of land (approximately 7.3 acres)
and 62,800 square feet of buildings
The Jordan Valley Shopping Center in West Jordan, Utah

Together with all water rights appurtenant thereto or used in connection therewith. (Said real property and improvements, if any shall hereinafter be referred to as "The Property")

2 PRICE. The total purchase price for said property is the existing debt calculated by adding +$50,000.00 Cash, +Note $~~200,000~~ 250,000 ($ 1,150,000 00 ~~Dollars~~) payable in lawful money of the United States strictly within the following times to-wit All sums paid for this option and any extension thereof as herein provided shall be first applied on the purchase price and the balance shall be paid as follows (1) Buyer will assume and extinguish the first mortgage and accrued interest and give Seller an unsecured (2.) Note for $250,000.00 payable as follows Ten year term at 8% interest payable at $~~1,733.33~~ 2,027.77/month with a balloon principal payment of $~~200,000~~ 238,222 00 all due at the end of the 10th year This Note will be personally guaranteed by F.C. Stangl III. (3.) $50,000 00 cash, payable - $1,000 00 option fee and additional $49,000.00 payable on closing

3 EXTENSION OF OPTION Upon payment by Buyer to Seller of an additional sum of TWENTY FOUR THOUSAND AND NO/100---------- ($ 24,000.00) Dollars, cash or by cashier's check prior to the expiration of the first option period this option shall be extended for ~~3~~ 2 months, hereinafter referred to as "Second Option Period" Upon Buyer's payment to Seller of a further sum of TWENTY FIVE THOUSAND AND NO/100---------- $ 25,000 00) Dollars, prior to the expiration of the second option period, this option shall be extended for a third period of ~~2~~ 1 additional months, hereinafter referred to as "Third Option Period"

4 EXERCISE OF OPTION This option shall be exercised by written notice to Seller on or before the expiration of the first option period or if extended the expiration of the second or third option periods as the case may be Notice to exercise this option or to extend the option for a second or third option period whether personally delivered or mailed to Seller at his address as indicated after Seller's signature hereto by registered or certified mail, postage prepaid, and postmarked on or before such date of expiration shall be timely and shall be deemed actual notice to Seller Seller shall require the Bankruptcy Court to release this property and terminate the bankruptcy proceedings to facilitate the final closing of this sale

5 EVIDENCE OF TITLE

(a) Promptly after the execution of this option Seller shall deliver to Buyer for examination such abstracts of title title policies and other evidences of title as the Seller may have In the event this option is not exercised by Buyer, all such evidences of title shall be immediately returned without expense to Seller

(b) In the event this option is exercised as herein provided Seller agrees to pay all abstracting expense or at Seller's option to furnish a policy of title insurance in the name of the Buyer

(c) If an examination of the title should reveal defects in the title Buyer shall notify Seller in writing thereof and Seller agrees to forthwith take all reasonable action to clear the title If the Seller does not clear title within a reasonable time Buyer may do so at Seller's expense Seller agrees to make final conveyance by Warranty Deed or as directed In the event of sale of other than real property If either party fails to perform the provisions of this agreement the party at fault agrees to pay all costs of enforcing this agreement, or any right arising out of the breach thereof including a reasonable Attorney's fee

EXHIBIT NO 25
P GROVER

S0010019

PLAINTIFF'S EXHIBIT

002123

6. CLOSING ADJUSTMENTS. All risk of loss and destruction of property and expenses of insurance shall be borne by Seller until date of possession. At time of closing of sale, property taxes, rents, insurance, interest and other expenses of property shall be prorated as of date of possession. All other taxes, including documentary taxes, and all assessments, mortgage liens and other liens, encumbrances or charges against the property of any nature, shall be paid by Seller except as set forth in Paragraph 2 of this option.

7. POSSESSION. Seller agrees to surrender possession of the property on or before ..... days following written notice of the exercising of this option by Buyer.

8. The Seller recognizes F.C. Stangl ..... Real Estate Company (Broker and Agent) through its salesman ...None ..... as the Real Estate Broker with whom Seller listed this property for sale, and Seller agrees to pay a commission to said Broker of ...0.....% of the gross sale price. Seller hereby authorizes the agent to withhold such commission from the proceeds of sale at time of closing.

9. If this option be not exercised on or before the dates specified herein for exercise of same, the option shall expire of its own force and effect and the Seller may retain such option monies as have been paid to the Seller as full consideration for the granting of this option.

IN WITNESS WHEREOF, the Seller hereunto has set his name this 29th day of June 19 88.

SIGNED IN PRESENCE OF:

6/23/88

Seller

Address of Seller: _____

S0010020